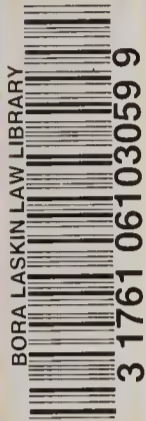




UNIVERSITY OF
TORONTO
FACULTY OF LAW



PROPERTY LAW: 2007-2008

VOLUME ONE

J. Phillips
Faculty of Law
University of Toronto

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CHAPTER ONE

PROPERTY IS RIGHTS NOT THINGS

INTRODUCTION

These materials are designed to achieve two principal purposes. First, most of the chapters deal with the basic principles of the common law of real property (land law). In this area they deal both with traditional common law "ownership" and rights less than ownership (including leasehold relationships), and with common law aboriginal title. Second, principally in the first two chapters, the materials examine the nature of property. They ask what the word "property" means to a lawyer, and examine how the courts deal with claims that things not previously considered to be "property" should be made so.

While in one sense these two purposes are distinct (land is obviously property in common law societies) in another sense they are intimately related. This is because while land is property, we will see that the rights of land owners are contested matters. Thus your study of the rules regulating the uses of real property should be carried out against the background of the more general and theoretical material dealt with in the first two chapters.

The first proposition we will examine is contained in the title to this chapter - "property is rights not things". For lawyers, the word "property" refers to that set of rules which govern the relations among people about the use and transfer of things, both tangible and intangible. It is useful to break down this definition into its constituent parts, and expand briefly on each:

(a) Property is a "set of rules". Lawyers are interested not in the "things", the resources which are the objects of property law, but in the rules which govern how those resources are to be used.

(b) Property rules govern "relations among people". Property rules allocate rights in things to and among people. They do not govern the things themselves. In addition, note that the entitlements that people are given to things are not unitary or fixed. The rules vary across time and society, and also depend on the thing being regulated, the type of entitlement (see "c" below), and the relationship involved.

(c) Property rules govern "use and transfer". Property rules therefore deal with various kinds of entitlements. Principally they involve rights to use (and limits on those rights) and rights to transfer. The former includes the right to exclude others from using.

THE CATEGORISATION OF PROPERTY IN THE COMMON LAW

The principal traditional distinction in the common law of property is that between real property (land) and personal property (all other forms of property). This is actually a distinction which derives from medieval forms of civil procedure - different actions were available to sue in relation to land than were available for all other actions.

Whatever its origins, this distinction still governs the way in which property is categorised in the common law. Real property is further sub-divided into corporeal hereditaments - essentially the estates system described in chapter four - and incorporeal hereditaments - interests in land that are less than title such as easements and covenants, described in chapters six and seven. They can be thought of as "use rights."

Personal property is usually sub-divided into the categories of *choses in possession* and *choses in action*, which translates as tangibles and intangibles. "Intangibles" means such "things" as copyright, trademarks, patents, stocks, bonds, corporate shares, a right to enforce a debt, a claim to pension payments in the future, even though some of them have tangible manifestations - a share certificate, for example. In Canada a bank note is a *sui generis* entity, not categorised as either a chose in possession or a chose in action.

The real-personal distinction does not include aboriginal rights to land, and it is unclear where these should go. They might be seen as a third principal category under real property - they are certainly not corporeal or incorporeal hereditaments. More properly they should be seen as unique interests, adding a third general category to the real-personal distinction. The Supreme Court of Canada has consistently described aboriginal title as a *sui generis* interest.

The material which follows in this chapter is included to expand on some of the ideas already briefly outlined - that "property" to a lawyer means rights, not things, and that the precise allocation of rights (entitlements) can vary from one property regime to another. The *Harrison v. Carswell* case also shows that judicial values can in part determine the results of any dispute about property entitlements. That is, the common law does not always reach results through the simple and uncontroversial application of "neutral" or "objective" rules uninfluenced by values.

NOTE

In Committee for the Commonwealth of Canada v. Canada (1991), 77 D.L.R. (4th) 385 (S.C.C.) the Supreme Court of Canada dealt with the issue of whether the federal government could bar people from distributing political propaganda and soliciting membership at an airport. As this was an action against government regulation the case turned on the freedom of expression guarantee in the Charter of Rights.

The Court held that the Charter protects the right to expressive activity in public airports. The judges did not agree, however, on much else, and six separate opinions were given. For current purposes the judgments of Lamer C.J.C., L'Heureux-Dube J. and McLachlin J. are important. L'Heureux-Dube J. held that there was a prima facie right to expression on all government property, and that any limitations must be justified under section 1 of the Charter, the limitation provision.

Lamer C.J.C. and McLachlin J. both held that there was an "internal" limitation within the freedom of expression guarantee. Lamer C.J.C. found that while government property was not like private property, and was presumptively a place where an individual had a right to express opinions, he or she could do so only if the form of the expression was compatible with the function of the place and did not interfere with the ordinary workings of the airport and the interests of the airport authorities and passengers. McLachlin J. focused both on the nature of the expression and on the forum. Some government property was traditionally "private", some traditionally "public". Once it was established that the property in question was the latter, and that the expression promoted one of the purposes for having a guarantee of freedom of expression, there was prima facie a breach, and any limitation had to be justified under section 1.

CHAPTER TWO

WHICH RIGHTS IN WHICH THINGS?

INTRODUCTION

This chapter is about novel claims for property rights. That is, the cases involve courts deciding whether to award property rights in certain things to certain individuals. Some involve claims to a substantial bundle of rights, others to a more limited number of strands. In some the contest is essentially between private claimants, in others the thing in question will either be subjected to a private property regime or a common property one. These cases reveal that Macpherson is correct to suggest that "property" is a changing concept. In reading them it might also be useful to bear in mind, even if you do not agree with it, Macpherson's further assertion that the concept of property is a "purposeful" one, that its meaning alters over time because of changing conceptions about how social interests may best be served.

In a part of his "Introduction" not reproduced in chapter one, Macpherson expands on his statement that although property is an enforceable claim to the use or benefit of something, private property rights - the exclusion of some from the use of resources - do not rest on force or the threat of force alone. He points out that all societies provide ethical justifications for private property. He states:

Property is controversial ... because it subserves some more general purposes of a whole society, or the dominant classes of a society and these purposes change over time: as they change, controversy springs up about what the institution of property is doing and what it ought to be doing. [Thus] ... the institution ... of property is always thought to need justification by some more basic human or social purpose. The reason for this is implicit in two facts we have already seen about the nature of property: first, that property is a right in the sense of an enforceable claim; second, that while its enforceability is what makes it a legal right the enforceability itself depends on a society's belief that it is a moral right. Property is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right. This is simply another way of saying that any institution of property requires a justifying theory. The legal right must be grounded in a public belief that it is morally right. Property has always to be justified by something more basic; if it is not so justified, it does not for long remain an enforceable claim. If it is not justified, it does not remain property.

Even within a system like ours in which it is acknowledged that private property provides the dominant means of resource allocation, two kinds of problems may emerge. First, someone may claim that a particular thing, not hitherto considered to

be a suitable subject for private property, should now be held to be so. The courts must then grapple with whether to allow the claim, and on what basis. This is the kind of problem that is at issue in the cases in this chapter. Second, even when it is acknowledged that a thing is or should be the subject of private property, there may be questions about the extent of private rights. It was this second kind of question that was at issue in *Harrison v. Carswell* and it emerges also in some of the cases in this chapter.

Before we get to the cases it is useful to discuss two other topics, both of which will help us to understand the cases. First, the reading from Merrill immediately below discusses whether there are essential attributes, or just one essential attribute, which must be present in order for one to say that one has “property” in a thing. Must one be able to transfer something to another, for example, in order to have property in it? The alternative to what Merrill calls an “essentialist” approach is what he terms a “nominalist” approach - a person has property in a thing because the court or legislature says he or she does. No attribute such as transferability is either necessary or sufficient for calling something “property”. Merrill argues that the right to exclude is an essential (necessary) attribute of property; does he thereby do what Macpherson says we should not do, assume that “property” always means private property.

After the Merrill reading there is, from page 31, a (very rudimentary) discussion of the variety of justifications for private property that political and legal theorists have offered. While many of these theories are intended to justify the very fact of private property, we are not concerned with the institution of private property as such. It may or may not be a good idea, but it is here, and here to stay into the foreseeable future. But acknowledging that fact does not give us an answer to all questions about the nature and extent of property rights. Hence when we are presented with a novel claim, a case not simply resolvable by the use of legal precedent, courts often use versions of these justifications for, and/or theories about, property rights, explicitly or implicitly.

This is not to say that any particular theory, or any combination of theories, necessarily explains why property law has taken the form that it has. I do not offer my own prescriptions here, am not putting forward any particular conception of what is right. Indeed, it is my view that particular socio-political contexts are likely much better at explaining results than any abstract theory. But even where analysis might suggest that a court is strongly motivated by a desire to attack a particular social problem, one usually finds the decision itself making reference to both precedent and

theory. Thus it is useful to briefly review the principal justifications found in the literature. The material here also makes reference to issues raised in later chapters and thus, like chapter 1, you should see it as providing a broad foundation for the course as a whole, not only as background for the cases in this chapter.

T. W. Merrill, "Property and the Right to Exclude," (1998) 77 Nebraska L. R. 730

The [United States] Supreme Court is fond of saying that "the right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." I shall argue in this Essay that the right to exclude others is more than just "one of the most essential" constituents of property - it is the *sine qua non*. Give someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property.

Of course, those who are given the right to exclude others from a valued resource typically also are given other rights with respect to the resource such as the rights to consume it, to transfigure it, to transfer it, to bequeath or devise it, to pledge it as collateral, to subdivide it into smaller interests, and so forth. These other rights are obviously valuable and important, and it is not improper to speak of them as part of the standard package of legal rights enjoyed by property owners in most contexts. My claim is simply that in demarcating the line between "property" and "nonproperty" - or "unowned things" (like the air in the upper atmosphere or the resources of the ocean beyond a certain distance from shore) - the right to exclude others is a necessary and sufficient condition of identifying the existence of property. Whatever other sticks may exist in a property owner's bundle of rights in any given context, these other rights are purely contingent in terms of whether we speak of the bundle as property. The right to exclude is in this sense fundamental to the concept of property....

The Right to Exclude and the Concept of Property. Within the existing literature about the institution of property, there is a broad consensus about several propositions. This consensus does not extend, however, to the precise role that the right to exclude plays in defining that institution. I will briefly enumerate the principal points of consensus, and then turn to the disagreement over how to characterize the role of the right to exclude.

First, nearly everyone agrees that the institution of property is not concerned with scarce resources themselves ("things"), but rather with the rights of persons with respect to such resources.... Similarly, there is a consensus that the concept of property includes the rights of persons with respect to both tangible and intangible resources. Most people understand, at least in some dim fashion, that Tom Wolfe has something called a "copyright" in the contents of the book he has written, and that this copyright is Wolfe's property. They understand this to mean that Wolfe has certain rights with respect

JUSTIFICATIONS FOR PRIVATE PROPERTY

Labour.

One of the most commonly-cited justifications for private property is that it reflects the rewards of labour. The theory goes back to John Locke, and is variously referred to as the Lockean, or labour, or desert, theory. Locke argued that while originally "God ... hath given the World to Men in common ... for the Support and Comfort of their being", individuals had a natural right to their own labour. When that labour was mixed with a thing, the thing was removed from the state of nature and became the property of the individual who had worked with it. It was this process which transformed common property into individual property. Locke stated: "the grass my horse has bit, the turfs my servant has cut, and the ore I have digged in any place where I have a right to them in common with others, become my property without the assignation or consent of anybody. The labour that was mine, removing them out of that common state they were in, has fixed my property in them". Locke appended a number of qualifications and additions to this justificatory theory, to deal with the problems of limited resources and inequality of property ownership. But we are not concerned with studying Locke, only with the general idea of awarding property rights as a reward for labour. You should look for this labour theory in particular in *INS v. AP* and *Victoria Park*, and it also arises in *Caratun*. It is employed in those cases to argue that a "thing" not hitherto considered a suitable object of private rights in property should become so.

Occupancy or Possession.

Another justification that is sometimes offered for the allocation of property rights is that of "occupancy", or possession. That is, the person who first controls or occupies land or a chattel is allocated property rights. This is a theory quite similar to labour, and is sometimes conflated with it. That is, one can argue that occupancy/possession is either a form of labour or a proxy for it. But there is probably an important difference. Occupancy/possession provides a good example of a theory of property that functions not as a general justification for private property, or as justification for extending private property protection to new "things", but as a justification for the assignment of rights to particular persons in a context where we already accept that the thing is part of the private property world. That is, the fact that someone has occupied land cannot in and of itself persuade you that it should be permissible to have private rights in land. But once you have decided to adopt a regime of private

rights in land, occupancy may well persuade you to accord those rights to the occupier rather than to another person. Although this justification does not feature in the cases in this chapter, we will see in the next chapter and in the later chapter on aboriginal rights that there are contexts in which occupancy/possession have played, and continue to play, very important roles.

Utility.

A third principal theory about when to award private property rights is the principle of utilitarianism. This originally derived from Jeremy Bentham, who argued that the guiding principle of all social organisation should be the principle of utility - the greatest happiness of the greatest number, with happiness being measured by the excess of pleasure over pain. More particularly, happiness was said to consist of subsistence, abundance, equality and security. Bentham recognised that there could be conflicts between these ends, and he argued that subsistence and security were more important than the other two, with security pre-eminent. He stated: "unless laws are made directly for security, it would be quite useless to make them for subsistence. You may order production; you may command cultivation; and you will have done nothing. But assure to the cultivator the fruits of his industry, and perhaps in that alone you will have done enough". Thus security in the form of private property was needed to ensure subsistence.

That was how Bentham justified the fact of private property. In addition, he accepted as inevitable its corollary - inequality. While Bentham thought that equality in property was a contributor to happiness, he saw it as a distinctly lesser goal: "We cannot arrive at the greatest good, except by the sacrifice of some subordinate good Equality ought not to be favoured except in the cases in which it does not interfere with security If all property were equally divided, ... the sure and certain consequence would be, that presently there would be no property to divide. All would shortly be destroyed If the lot of the industrious was not better than the lot of the idle, there would be no longer any motives for industry". Bentham, however, did not simply advocate the untrammelled pursuit of acquisition. He stated that "the laws ought to do many things for subsistence which they ought not to attempt for the sake of abundance". Thus utilitarianism can in principle support some limits on the extent of private property ownership, up to and including a community power of expropriation, although such a policy affects the security aspect of utility.

Utilitarians offer no particular prescription for what a property regime should look like. Rather, utilitarianism says that we should employ the principle of utility as a standard against which to measure property rules. There is what might be called a kind of cost benefit analysis method of deciding where property rights should be allocated. What that method reveals should be worked out on a case by case basis; utilitarianism never requires any particular kind of answer. Utilitarian approaches emerge in some of the cases below, in *INS v. AP* and in *Stewart* in particular, and one might call the argument that the wife should have been seen as having a property right in her former husband's dental licence a utilitarian one, for awarding her some right would advance the social policy of economic equality on divorce.

Economic Efficiency.

The "law and economics" school argues that the market is the most efficient mechanism for the production and allocation of resources, and therefore it produces the widest level of economic satisfaction for individuals. A society's property regime should therefore incorporate maximum levels of exclusivity (make all things capable of private ownership), uses (which enhances value), and transferability (which increases exchange). Most law and economics scholars assume that all people are rational wealth maximisers, and that the market will move resources to those who value them most. Market efficiency would presumably support at least as broad a right of property as the common law currently provides.

A common tale told by advocates of full market freedom is the "tragedy of the commons". If land is available for grazing to all, there will be an incentive for one farmer to place as many cows as possible on it, because he or she will gain out of all proportion to the loss of grazing space, which will be borne by all. But when all farmers behave this way, the finite resource will be used up and no pasture will be available for anybody. The law and economics answer is privatization, which provides an incentive to conserve for the future because the consequences of overgrazing are not shared by all. An alternative view offered by some is that the tragedy of the commons is not caused by common property, but by unregulated uses of common property. That is, it is a tragedy caused by untrammelled private rights. *INS v. AP* might be seen as illustrating both sides of this argument. Other critics of the privatization argument point out that it is empirically incorrect to assume that private owners would not exhaust the resource for their own gain without regard to the future.

Note here that a second version of “law and economics” also assumes that people are rational wealth maximisers, but is concerned not so much to prescribe a legal regime as to describe the consequences of legal rules. That is, it asks what people are likely to do in response to a given rule and suggests that courts and legislatures take into account such likely responses in formulating the rules in the first place. This school might say that *INS v. AP* is correctly decided because unless some protection is given to the producers of news copy there would be no incentive to go on producing it.

Finally, note also that not all economists believe in having private property in all commodities. While some do argue that child adoption systems or organ donation should be left to the market, others are persuaded that for some transactions other considerations matter, beyond efficiency.

Freedom and Personality.

Some justify private property because it enhances human freedom and moral development. There are various versions of this. In one version we simply have a claim that private property gives the citizen freedom from state intervention and thus more individual autonomy. This is, in a sense, the flip side of the argument noted below that property confers power as against the non-proprietary; it also confers power as against the state. While there is an obvious truth to the general assertion of a relationship between private property and state power, critics point out (1) that this is freedom for the few, not the many, and (2) that the argument ignores the fact that the state does intervene to protect private property. Thus far from being constrained by private property, the state is delegating its power to property holders.

Another version of the "human freedom and development" theory starts with Hegel, who argued that private property - the ability to control resources - allows humans to exert their will over the external environment and in the process to demonstrate their individuality. Indeed it was this assertion of dominance over things which liberated the personality, made human beings human. Hegel believed that all things should be capable of being made the subject of private property rights. While Hegel's theory is difficult to link to particular debates in property law, it does provide a general justification for private property and, therefore, for particular grants of it in particular cases.

Some contemporary scholars have accepted the idea that control over external

resources is necessary for personhood, but have argued that there is a distinction between basic entitlements (food, housing etc) and property acquired and used for exchange. The personhood argument, they say, does not justify the latter. But it may justify, in this chapter, awarding some limited property right in a licence to practice dentistry to a non-qualified spouse (*Caratun*).

Property and Power.

Cutting across, or treating as irrelevant, all or most of the theories noted above are commentators who start from the position that, in Macpherson's words, "any system of property is a system of rights of each person in relation to other persons" and that property rights "carry with them, when they are held in quantities larger than an individual can work by himself, a power to control in some measure the lives of others". Property is power. The legal realist Morris Cohen made this point 80 years ago, and went on to say that merely to recognise that private property is power is not necessarily to conclude that it is a bad thing. Rather, recognising the fact also demands recognition of a corollary fact: "it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government". (M.R. Cohen, "Property and Sovereignty" (1927) 13 *Cornell Law Quarterly* 8.) Thus a factor that for some enters into the utilitarian calculus is the need to reduce such private power. This consideration surely informs Brandeis' dissent in *INS v. AP.*, and perhaps underpins the "sales v subject" distinction laid out in the *Glen Gould* case.

Some people stress this power in terms of class, others in terms of gender or race. But all would argue for a regime of property rights that limits the strands in the bundle of rights held by particular individuals. *Harrison v. Carswell* in chapter one, and *Re Noble and Wolf* in chapter four, are obviously susceptible to analysis on these kinds of grounds. In addition, attention to property as power might mean limiting a landlord's ability to set his or her own terms in the rental market - rent controls and security of tenure for tenants. Or it might mean insisting that one spouse (usually male) who participates in the waged economy does not keep all of the fruits of that participation, but must share them with a spouse (usually female) who performs domestic labour - family property legislation: see the *Caratun* case in this chapter. Or, most starkly, it might affect how one views the claims of Canada's aboriginal peoples to an aboriginal title in their lands. Or, to return to the residential tenancy example, it might mean prohibiting discrimination on racial grounds in the selection of tenants.

Before leaving the topic of theories of property, two further points should be made. First, buried in the cases you may discern another theory, if one can call it that. Harking back to Merrill, legal analysis tends at times to assume that there is an "essence" to what is property, that only things with certain attributes can be property. For example, in *Caratun*, below, the court seems to suggest that something must be "inherently transferable" to be property, even though the law already recognizes that some non-transferable items are property. In my view an appeal to some kind of essentialism ignores the fact that property is rights, not things, and those rights are awarded by those with the power to do so, including the courts. Thus to say that something is "not property" is simply to say that a court has not said that it is, not that it somehow cannot be property. There is no generally accepted catalogue of what counts as property, no clear "core" of what the bundle of rights must contain. Having said that, it is the case, as discussed in chapter 1, that there is at least one necessary *indica* of *private* property - the right to exclude others.

Second, it should be stressed that there is no necessary correlation between a particular theory about property and the adoption of a particular political position. True, it may be difficult to be a proponent of efficiency theory and a believer in regulation of the market and redistribution of goods. But labour theory, for example, can be used both to support awarding property in the news to a large corporation (*INS v. AP*) and to justify giving a value to domestic labour, thereby addressing the complaints of feminists that our society fails to recognise the contribution that many women make to the domestic economy (*Caratun*). Similarly, personality theory is at least as much of an argument for all members of society having basic entitlements - an issue we will discuss in chapter 8 - as it is for allowing unlimited acquisition by the few. Thus some theories are found in different guises at different points of the political spectrum.

introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly disclosed wrong, although the propriety of some remedy appears to be clear.

NOTES

1) In *Pittsburgh Athletic Co. et al v. KQV Broadcasting Co.* 24 F. Supp. 490 (U.S. Dist. Ct., Penn, 1938) the Pittsburgh Pirates obtained an injunction to prevent the defendants from making unauthorized broadcasts of their games from nearby leased premises which overlooked the stadium. The Pirates had given exclusive broadcasting rights to two other radio stations, rights which Schoonmaker J. described as property. He said at p. 492 that KQV's action: "amounts to unfair competition and is a violation of the property rights of the plaintiffs. For it is our opinion that the Pittsburgh Athletic Company by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom, has a property right in such news and the right to control the use thereof for a reasonable time following the games."

2) In *Canadian Admiral Corporation Ltd. v. Rediffusion Inc.*, [1954] Exch. 382 the defendant cable company intercepted C.B.C. transmissions of Montreal Alouette games and broadcast them to its subscribers. The court held that "no matter how piratical, the taking by one person of the work of another may be, such taking cannot be an infringement of the rights of the latter unless copyright exists in the work." It then held that such copyright did exist under the provisions of the Copyright Act.

3) One commentator, while noting that the misappropriation doctrine enunciated in *INS v. AP* has had limited application, nonetheless approves of this decision as one dealing with "certain types of services of a fragile character, rather than products, whose commercial exploitation without destruction by immediate imitation is difficult": J.A. Rahl, "The Right to 'Appropriate' Trade Values" (1962) 23 *Ohio State L. J.* 56 at 57. Rahl argues that the misappropriation doctrine should not be employed against competition generally, but only against competition "where the result would be to destroy either the value created by plaintiff or the market for it". That is, "the

protection ...[should] safeguard the plaintiff's opportunity to market his trade value" at all; it should not protect opportunities to increase profitability. He states: "the court's protection ... [should be] reserved for situations in which defendant's conduct threatens to destroy the opportunity to market the trade value, the prospect of which has induced plaintiff to bring it forth" (p. 63).

4) In two cases involving the Boston Marathon the Boston Athletic Association (BAA) sought to invoke the misappropriation principle. *Boston Athletic Association v. Sullivan* 867 F.2d 22 (1st Cir. 1989) concerned a company selling t-shirts with "Boston Marathon" written on them. The BAA was successful in enjoining this. In *WCVB-TV v. Boston Athletic Association* 926 F.2d 42 (1st Cir. 1991) the BAA had sold "exclusive" TV rights to one local TV station, but another one planned to broadcast the marathon simply by setting up cameras on the streets. The BAA failed in an attempt to obtain an injunction to prevent this. In the course of its decision the court stated:

As a general matter, the law sometimes protects investors from the 'free riding' of others; and sometimes it does not. The law, for example, gives inventors a 'property right' in certain inventions for a limited period of time; ... it provides copyright protection for authors; ... it offers certain protections to trade secrets.... But, the man who clears a swamp, the developer of a neighbourhood, the academic scientist, the school teacher, and millions of others, each day create 'value' (over and above what they are paid) that the law permits others to receive without charge. Just how, when and where the law should protect investments in 'intangible' benefits or goods is a matter that legislators typically debate, embodying the results in specific statutes, or that common law courts, carefully weighing relevant competing interests, gradually work out over time". [emphasis in original]

What distinguishes the two Boston Marathon cases? What distinguishes the latter Boston Marathon case from the case cited above involving the Pittsburgh Pirates?

5) Two recent applications of *INS v. AP* are *National Basketball Association v. Motorola Inc* 105 F.3d 841 (2nd Cir. 1997), and *Morris Communications Corp v. PGA Tour, Inc.* 235 F. Supp. 2d 1269 (M.D. Fla 2002); affd. 70 U.S.P.Q. 2d 1446 (C.A.). In the former case Motorola produced a hand-held pager device that provided real-time scores of NBA games, as well as an on-line service provider which did the same thing. Motorola took the information from radio and TV broadcasts. Among other claims the NBA said that this was misappropriation.

The U.S. Court of Appeals for the Second Circuit dismissed the claim, and its decision is complicated for our purposes by the US *Copyright Act* of 1976. This Act, in line with general copyright principles, effectively made such information not copyrightable.

More importantly, it also pre-empts many claims for the legal protection of information through other legal causes of action. There are exemptions to pre-emption, and in this case the court held that only a narrow exception existed - the so-called "hot news" claim. For a "hot news" claim to succeed in a misappropriation suit five elements must be present: (i) the plaintiff must incur some cost in generating the information; (ii) the value of the information must be very 'time-sensitive'; (iii) the defendant must be 'free-riding'; (iv) the defendant must use the information in direct competition with the plaintiff; and (v) there must be a substantial threat to the financial viability of the plaintiff's production of the information. The court held that while some of these elements were made out, not all were. The information was time-sensitive, and the NBA had a product, which it was expanding, which competed. But the NBA's primary business was putting on the games and transmitting live broadcasts of them, and thus Motorola was only competing with a part of the league's business, the transmission of factual information. And it was not free-riding on that - it did not get its information from the NBA's own real-time news service. Motorola expended its own resources on gathering the information which it then transmitted to subscribers.

In the *PGA Tour* case a news service was not permitted to have employees attend PGA tournaments unless they agreed not to transmit over the internet real time golf scores obtained from the media centre, such information being collected from all 18 holes by the PGA's own system. Morris Communications said this was tantamount to exercising a property right over the information, and that according to the Motorola case it should be allowed to disseminate the information it picked up in the media centre. The court found for the PGA, distinguishing Motorola on, *inter alia*, the ground that the PGA was within its rights to deny access to the course unless the observer agreed not to disseminate the information.

is possible regardless of changed circumstances.

The valuation approach approved by the trial judge in this case was to compare the appellant's actual professional income since attaining his dental licence up to September 1986 with the average earnings of an honours university graduate of the same age during the same period. His future professional income from 1986 until his expected retirement age of 65 was determined, based on his actual income level adjusted by the rate of growth of income for dentists according to the American Dental Association. The difference between his projected future earnings and those of honours graduates was valued at an annual discount rate of 2.5 per cent according to the Rules of Civil Procedure. Based on this approach, a valuation of the dental licence as of the valuation date, July 18, 1981, was found to be \$379,965. This valuation did not take into account any of the contingencies of the type referred to above. Another method of valuation, which resulted in the figure of \$219,346, was to compare the expected career earnings of the average dentist obtaining his licence in July 1981 and retiring in November 2013, to the average earnings of honours university graduates for the same period.

Either valuation approach is logical, if the licence is "property." However, it would be equally logical to treat a university degree as property, and then value that degree by comparing incomes of university graduates with those of high school graduates. In the matrimonial context, the fallacy lies in treating a licence as property on valuation date, when most of its value depends on the personal labour of the licensed spouse after the termination of the relationship. That future labour does not constitute anything earned or existing at the valuation date. For all of the above reasons, it is my view that a professional licence does not constitute property within the meaning of s. 4 of the F.L.A.

NOTES

- 1) Despite its conclusion on whether the licence was property, the court in *Caratun* employed the support provisions of the federal *Divorce Act* to award Mrs Caratun a lump sum payment of \$30,000. This decision was refused leave to appeal by the Supreme Court of Canada: (1993), 46 R.F.L. (3d) 314 (S.C.C.).
- 2) Most Canadian decisions, and commentators, have come to the same conclusion as the Ontario Court of Appeal on this issue. For a review see N. Bala, "Recognizing Spousal Contributions to the Acquisition of Degrees, Licences and Other Career Assets: Towards Compensatory Support", (1989) 8 *Canadian Journal of Family Law* 23.
- 3) A dental practice is considered to be property for the purposes of the *FLA* in Ontario, and its value is usually calculated as assets plus goodwill minus liabilities. Is this inconsistent with the holding in *Caratun*? Pension entitlements, which will be paid in the future, are also considered to be property; is that inconsistent?

would not be within the ambit of the tort. To take a more concrete example, in endorsement situations, posters and board games, the essence of the activity is not the celebrity. It is the use of some attributes of the celebrity for another purpose. Biographies, other books, plays, and satirical skits are by their nature different. The subject of the activity is the celebrity and the work is an attempt to provide some insights about that celebrity.

Adopted to the present case, the book in question contains 26 pages of text by Carroll together with photographs depicting Gould in posed and spontaneous moments at the beginning of his concert career. I agree with the comment on the overleaf: "They capture the passion and brilliance of Gould as pianist, the solitude of Gould as artist and the boyish nature of Gould as a young man". Although it is primarily through Gould's own images and words, this book provides insight to anyone interested in Gould, the man and his music. The author added his own creativity in recounting his time spent with Gould and in making decisions about which photographs and text to use and how they should be arranged to provide this glimpse into Gould's solitary life. There is a public interest in knowing more about one of Canada's musical geniuses. Because of this public interest, the book therefore falls into the protected category and there cannot be said to be any right of personality in Gould which has been unlawfully appropriated by the defendants.

NOTES

1) Although it was not necessary to do so, Lederman J. went on to discuss whether a right of publicity/ right of action for appropriation of personality survived the death of the subject; that is, whether it descended to heirs. He held that it did, noting, inter alia, that "[t]he right of publicity ... protects the commercial value of a person's celebrity status. As such, it is a form of intangible property, akin to copyright or patent, that is descendible.... The right of publicity, being a form of intangible property ..., should descend to the celebrity's heirs. Reputation and fame can be a capital asset that one nurtures and may choose to exploit and it may have a value much greater than any tangible property. There is no reason why such an asset should not be devisable to heirs."

Lederman J. also dismissed the estate's second claim, that it held copyright in the conversations with Carroll. He stated that "for copyright to subsist in a work, it must be expressed in material form and have a more or less permanent endurance" and that "a person's oral statements in a speech, interview or conversation are not recognized in that form as literary creations and do not attract copyright protection".

An appeal to the Court of Appeal in *Gould* was dismissed (unreported judgment, 1998, QL [1998] O.J. no 1894, but on the basis that Carroll owned copyright in the

photographs, captions and text which appeared in the book.

2) The consequences of recognizing the same kind of personality right as the courts in the United States have been criticized in M.A. Flagg, "Star Crazy: Keeping the Right of Publicity Out of Canadian Law" (1999) 13 *Intellectual Property Journal*. There it is argued that the law favours "the rights of successful and well-known individuals over the rights of the public to depict, use, parody or honour many of the cultural icons of our time". Flagg suggests that the parameters of any publicity right should be legislated, because legislation would consider both the rights of creators with those of users and with Charter of Rights values such as freedom of expression and equality.

3) As may be inferred from *Gould*, the common law does not generally recognise what we might call a 'right of privacy' in our personalities. There are exceptions, including section 5 of the Quebec *Charter of Human Rights and Freedoms*, which reads: "Every person has a right to respect for his private life". That section was applied in *Aubry v. Editions Vice-Versa Inc* [1998] 1 S.C.R. 591. Pascale Aubry brought an action against a photographer and a magazine for taking and publishing, without her consent, a picture of her sitting on the step of a building in downtown Montreal. The Supreme Court of Canada held that this was an infringement of the plaintiff's right to privacy under the Quebec Charter. The majority judgment of L'Heureux-Dube and Bastarache JJ. stated: "that right must include the ability to control the use made of one's image, since the right to one's image is based on the idea of individual autonomy". The right to privacy needed to be balanced against "[t]he public's right to information" and against another person's right to freedom of expression. Thus there were circumstances in which a person lost control of the right to determine when his or her image was used; one obvious example was that of a public figure acting in the public domain, another was that of someone photographed as part of a crowd scene but who was not the subject of the photograph. But in this case those considerations did not apply, and the publishers were liable even in the absence of any defamation or other prejudice.

4) Some common law provinces have privacy Acts, which provide some protection. That of British Columbia (*Privacy Act*, R. S.B.C. 1996, c. 373) makes it a tort to "violate the privacy of another." It also states that: "It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of ... property or services, unless that other ... consents to the use for that purpose." In *Poirier v. Wal-Mart Canada Corp*, [2006] Carswell BC 1876 (B.C.S.C.) the plaintiff was a store manager for Wal-mart who did

consent to his name and photograph, accompanied by a welcoming message, to be used for the opening of a new Wal-mart store which he was going to be the manager of. But shortly thereafter he was dismissed for unacceptable accounting practices. Five weeks after his dismissal an extensive advertising campaign was run featuring him. The trial judge held that the dismissal "must surely be interpreted to cancel the consent previously provided." He distinguished a number of other cases, including *Krouse*, principally on the ground that in them the individual was not recognisable. Poirier was awarded \$15,000 in compensation.

NOTES

1) For a comment on the Stewart case which discusses also the other cases we have looked at, see A. Weinrib, "Information and Property", (1988) 38 *University of Toronto Law Journal* 117. See also D. Doherty, "When is a Thief Not a Thief? When he Steals the Candy but Leaves the Wrapper", (1988) 63 C.R. (3d) 322. Both authors disagree with the Supreme Court's ruling. Doherty writes that the result "seems ludicrous" because criminal liability is made to depend "on whether [Stewart] ... took the package (a worthless item) along with the contents (a valuable item)". He further argues that "a consideration of the language of s.283 of the *Criminal Code* ..., along with the applicable policy considerations, yields the conclusion dictated by common sense: Mr. Stewart should have been convicted".

2) In *American Heart Association at al v. County of Greenville*, 331 S.C. 498, the plaintiffs, the beneficiaries under the will of one Katie Jackson, argued that she, and ultimately they as well, owned the original will of (Shoeless) Joe Jackson. They wanted it, of course, because his signature was worth a lot on the collectables market; in his case the value was enhanced by the fact that a Jackson signature was extremely rare. The plaintiff's argument was based on the fact that before death a person clearly owned his or her will and could do whatever he or she wanted with it. The Supreme Court of South Carolina rejected the claim, on the grounds that state law required the will to be filed with the Probate Court by the executor, and that as a result it became a public record and thus the property of the state.

CHAPTER THREE

POSSESSION AND TITLE AT COMMON LAW

A) WHAT IS POSSESSION, AND WHY DOES IT CONFER RIGHTS?

INTRODUCTION

Possession is a crucial concept in the common law of property. Here we are mainly concerned with when possession gives rise to title (ownership), and why it does so, with relation to both real property (land) and other forms of property.

Clift v. Kane and *The Tubantia* are both cases about what constitutes “possession” in law for the purpose of awarding someone a title consequent on that possession. One obvious point that they make is that “possession” means different things in different contexts. Perhaps equally obviously, while “actual” possession, the physical control of an object, is invariably enough to say that one has legal possession, it is not necessarily required. In *Clift v. Kane* the defendant Kane had actual possession, the plaintiff Clift did not, and Clift was awarded the property rights that flow from first possession. Yet the dissent would have awarded the rights to Kane. Both judgments are based on a mixture of precedent (as each judge understands it) and utilitarian arguments. One thing they disagree on is the role that “custom” and the specific circumstances of the Newfoundland seal industry should play.

In *The Tubantia* the circumstances were such that nobody could have “actual” possession. What does this case tell us about the importance of context - the nature of the property in question, the circumstances of its location, the nature of the “possessor’s” activities, and, again, the “custom” of the business?

One issue we will discuss is what amounts to sufficient possession? But behind that question are some deeper questions. Why do we award ownership based on possession at all? And why do we award it based on certain acts of possession, rather than a different level of control (more or less) over the object? Thinking about these questions, which are addressed in the cases, requires us to look at the values which inform, indeed at times produce, the rules.

B) FINDERS: GENERAL

INTRODUCTION

The law relating to finders of “lost” objects demonstrates both the importance of possession and the relative nature of title to chattels. The cases here show that the finder of an object can claim title to that object. This principle is often supported by reference to a classic English case, *Armory v. Delamirie* (1722) 93 E.R. 664, in which a chimney sweep found a jewel and carried it to a goldsmith to have it valued. The goldsmith kept the precious stones, and the chimney sweep sued successfully for their return. The court promulgated the following rule: “That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the owner.”

Note that the last phrase tells us that the chimney sweep had “a” title, not “the” title. His title was not as good as the original owner’s, because the latter was a prior title. The common law has a hierarchy of title according to chronology.

Our first finders case, *Keron v. Cashman*, deals, like the earlier cases in the chapter, with what constitutes possession, in this case for the purpose of saying that someone is a “finder”. A good definition of what kind of possession is necessary is contained in the *Parker* case below - the “finder” must take the article into his or her “care and control” before he or she has sufficient possession. *Keron* also shows us that two or more finders can come into common possession.

KERON v. CASHMAN et al., 33 A. 1055 (N.J. Chancery 1896).

EMERY, V. C. The bill in this case is filed by the stakeholder or custodian of lost money, and the sum in his hands, amounting to nearly \$800, has been paid into court, to abide the decision of the controversy between the defendants as to their respective rights in the fund. The money was found under the following circumstances: A party of boys, five in number, were going on their way home along a railroad track in the city of Elizabeth. The youngest boy, Crawford, about nine years of age, being ahead of the others on the railroad embankment, picked up an old stocking, tied at both ends, and in which something was tied up. Crawford says that, after picking up the stocking, he began swinging it, and that Cashman, the oldest of the boys, snatched it away from him. Cashman and the other three boys swear that Crawford threw the stocking down the embankment, and that then Cashman got it, and commenced beating the boys with it. The stocking passed from one boy to another in this play, and finally it broke

as anything but a plaything or abandoned article, I am of the opinion that the money within the stocking must be treated as lost property, which was not "found," in a legal sense, until the stocking was broken open during the play. At that time, and when so found, it was in the possession of all, and all the boys are therefore equally finders of the money, and it must be equally divided between them. The case is most peculiar in its circumstances, and differs from any of the cases cited by counsel, but the general principles to be applied are stated in the cases cited in 7 Am. & Eng. Enc. Law, p. 977, and notes. In Durfee v. Jones, 11 R. I. 588, the bailee for sale of a safe, while examining it, found a sum of lost money inside the casing, and was held entitled to retain it against the owner of the safe, because the owner never had any conscious possession of the money. All of the cases agree that some intention or state of mind with reference to the lost property is an essential element to constitute a legal "finder" of such property, and the peculiarity of the present case is that the intention or state of mind necessary to constitute the finder must relate to the lost money inclosed within a lost stocking, and not to the lost stocking itself, in the condition when first found; and, under the circumstances established by the evidence in this case, the finder of the lost stocking was not, by reason of such finding, the legal finder of the lost money within the stocking. A decree will therefore be advised dividing the money equally between the defendants.

NOTES

1) As already stated, the best title to the money in *Keron* was that of its original owner, but he or she did not take part in the litigation. The original owner did win in another classic case, *Moffatt and Another v. Kazana* [1969] 2 Q.B. 152. Mr Russell owned a house and in 1950 placed a metal box with a large number of banknotes in a space in the brickwork of the chimney in the attic. The house was later sold to Kazana, and three years after that some workers installing a stove found the box. When they discovered the money inside they took it to the police, who then gave it to Kazana. Mr Russell sued for return of the money, but died during the proceedings. His executors continued the suit.

The defendants argued that the evidence was not sufficient to establish that Mr Russell had put the money in the box in the first place, but the judge decided that he had, even though "it is very odd that if the money did belong to Mr. Russell he did not think of it at the time when he sold the house to the defendant. One can only assume that he must have forgotten all about it." But if he did own the money when he bought the house, he retained title unless he had somehow divested himself of it. The judge reviewed cases which stood for the proposition that "true owners ... [have] a better title than either the finders or the occupiers of the land.... [T]he true owner of

a chattel found on land has a title superior to that of anybody else.”

Mr Russell, and subsequently his estate, therefore had the best title, unless Russell “had divested himself ... of the ownership by one of the recognised methods, abandonment, gift or sale.” Abandonment was not applicable - “One does not abandon property merely because one has forgotten where one put it.” Gift was obviously even more inappropriate. And sale was negated by the general principle that a conveyance of real property does not include chattels unless it explicitly says so.

2) This is the first part of the judgment of the Superior Court of California in the 2002 case of *Popov v. Hayashi*.

In 1927, Babe Ruth hit sixty home runs. That record stood for thirty four years until Roger Maris broke it in 1961 with sixty one home runs. Mark McGwire hit seventy in 1998. On October 7, 2001, at PacBell Park in San Francisco, Barry Bonds hit number seventy three. That accomplishment set a record which, in all probability, will remain unbroken for years into the future. The event was widely anticipated and received a great deal of attention. The ball that found itself at the receiving end of Mr. Bonds’ bat garnered some of that attention. Baseball fans in general, and especially people at the game, understood the importance of the ball. It was worth a great deal of money and whoever caught it would bask, for a brief period of time, in the reflected fame of Mr. Bonds. With that in mind, many people who attended the game came prepared for the possibility that a record setting ball would be hit in their direction.

Among this group were plaintiff Alex Popov and defendant Patrick Hayashi. They were unacquainted at the time. Both men brought baseball gloves, which they anticipated using if the ball came within their reach. They, along with a number of others, positioned themselves in the arcade section of the ballpark. This is a standing room only area located near right field. It is in this general area that Barry Bonds hits the greatest number of home runs. The area was crowded with people on October 7, 2001 and access was restricted to those who held tickets for that section.

Barry Bonds came to bat in the first inning. With nobody on base and a full count, Bonds swung at a slow knuckleball. He connected. The ball sailed over the rightfield fence and into the arcade. Josh Keppel, a cameraman who was positioned in the arcade, captured the event on videotape. Keppel filmed much of what occurred from

the time Bonds hit the ball until the commotion in the arcade had subsided. He was standing very near the spot where the ball landed and he recorded a significant amount of information critical to the disposition of this case. In addition to the Keppel tape, seventeen percipient witnesses testified as to what they saw after the ball came into the stands. The testimony of these witnesses varied The factual findings in this case are the result of an analysis of the testimony of all the witnesses as well as a detailed review of the Keppel tape. Those findings are as follows: When the seventy-third home run ball went into the arcade, it landed in the upper portion of the webbing of a softball glove worn by Alex Popov. While the glove stopped the trajectory of the ball, it is not at all clear that the ball was secure. Popov had to reach for the ball and in doing so, may have lost his balance. Even as the ball was going into his glove, a crowd of people began to engulf Mr. Popov. He was tackled and thrown to the ground while still in the process of attempting to complete the catch. Some people intentionally descended on him for the purpose of taking the ball away, while others were involuntarily forced to the ground by the momentum of the crowd. Eventually, Mr. Popov was buried face down on the ground under several layers of people Mr. Popov was grabbed, hit and kicked. People reached underneath him in the area of his glove.... The videotape clearly establishes that this was an out of control mob, engaged in violent, illegal behavior.

Mr. Popov intended at all times to establish and maintain possession of the ball. At some point the ball left his glove and ended up on the ground. It is impossible to establish the exact point in time that this occurred or what caused it to occur. Mr. Hayashi was standing near Mr. Popov when the ball came into the stands. He, like Mr. Popov, was involuntarily forced to the ground. He committed no wrongful act. While on the ground he saw the loose ball. He picked it up, rose to his feet and put it in his pocket.

Although the crowd was still on top of Mr. Popov, security guards had begun the process of physically pulling people off.... Mr. Hayashi kept the ball hidden. He asked Mr. Keppel to point the camera at him. At first, Mr. Keppel did not comply and Mr. Hayashi continued to hide the ball. Finally after someone else in the crowd asked Mr. Keppel to point the camera at Mr. Hayashi, Mr. Keppel complied. It was only at that point that Mr. Hayashi held the ball in the air for others to see. Someone made a motion for the ball and Mr. Hayashi put it back in his glove. It is clear that Mr. Hayashi was concerned that someone would take the ball....

Mr. Popov eventually got up from the ground. He made several statements while he

was on the ground and shortly after he got up which are consistent with his claim that he had achieved some level of control over the ball and that he intended to keep it.... When he saw that Mr. Hayashi had the ball he expressed relief and grabbed for it. Mr. Hayashi pulled the ball away. Security guards then took Mr. Hayashi to a secure area of the stadium.

It is important to point out what the evidence did not and could not show. Neither the camera nor the percipient witnesses were able to establish whether Mr. Popov retained control of the ball as he descended into the crowd. Mr. Popov's testimony on this question is inconsistent on several important points, ambiguous on others and, on the whole, unconvincing. We do not know when or how Mr. Popov lost the ball. Perhaps the most critical factual finding of all is one that cannot be made. We will never know if Mr. Popov would have been able to retain control of the ball had the crowd not interfered with his efforts to do so. Resolution of that question is the work of a psychic, not a judge.

How would you resolve the dispute?

C) FINDERS AND OCCUPIERS

To this point we have considered only the position of the finder in relation to the true owner and to other finders. But the cases show an additional complication - that in some circumstances, where the object is found on private property, the *occupier* (not the owner per se) of the land has a better claim than a finder. For some time, in both Britain and Canada, the cases were divided on whether the occupier had rights against the finder, and if so in what circumstances. The *Parker* case is now considered the leading authority on the question. In addition to sorting out what the rules on this are, think about the rationales offered for them.

PARKER v. BRITISH AIRWAYS BOARD, [1982] 1 QB 1004 (C.A.)

Donaldson L.J. delivered the first judgment. On November 15, 1978, the plaintiff, Alan George Parker, had a date with fate -- and perhaps with legal immortality. He found himself in the international executive lounge at terminal one, Heathrow Airport. And that was not all that he found. He also found a gold bracelet lying on the floor.

We know very little about the plaintiff, and it would be nice to know more. He was lawfully in the lounge and, as events showed, he was an honest man. Clearly he had not forgotten the schoolboy maxim "Finders keepers." But, equally clearly, he was well aware of the adult qualification "unless the true owner claims the article." He had had to clear customs and security to reach the lounge. He was almost certainly an outgoing passenger because the defendants, British Airways Board, as lessees of the lounge from the British Airports Authority and its occupiers, limit its use to passengers who hold first class tickets or boarding passes or who are members of their Executive Club, which is a passengers' "club." Perhaps the plaintiff's flight had just been called and he was pressed for time. Perhaps the only officials in sight were employees of the defendants. Whatever the reason, he gave the bracelet to an anonymous official of the defendants instead of to the police. He also gave the official a note of his name and address and asked for the bracelet to be returned to him if it was not claimed by the owner. The official handed the bracelet to the lost property department of the defendants.

Thus far the story is unremarkable. The plaintiff, the defendants' official and the defendants themselves had all acted as one would have hoped and expected them to act. Thereafter matter took what, to the plaintiff, was an unexpected turn. Although the owner never claimed the bracelet, the defendants did not return it to the plaintiff. Instead they sold it and kept the proceeds which amounted to £850. The plaintiff discovered what had happened and was more than a little annoyed. I can understand his annoyance. He sued the defendants in the Brentford County Court and was awarded £ 850 as damages and £ 50 as interest. The defendants now appeal.

It is astonishing that there should be any doubt as to who is right. But there is. Indeed, it seems that the academics have been debating this problem for years. In 1971 the Law Reform Committee reported

D) FINDERS AND ILLEGALITY

In *Parker* Donaldson L.J. states both that a trespassing finder always loses to the occupier, and that a “dishonest taker” has only a “frail” title. Both these assertions raise the issue of what effect an illegal act should have on property law’s rules for the allocation of title. Should the law simply apply the rule that possession of the right kind makes a person a finder and therefore gives him or her a finder’s title? Or should property law give way to other considerations.

The leading case on both trespassers and “dishonest takers” from the Ontario courts is still *Bird v. Fort Frances*, [1949] 2 D.L.R. 791 (Ont. H.C.), although many people think the reasoning in *Parker* should now prevail. In *Bird* a 12-year-old boy was crawling around in the basement of a pool-hall when he found a can with a large number of banknotes in it - c. \$1,500. His “generous spending” alerted his mother to the windfall, and she gave it to the police. The owner was not traced, and the occupier of the pool hall did not make a claim. The issue was thus whether the money belonged to the boy or to the town. McRuer C.J.H.C. found for the boy. His judgment is long and confusing, but it did include an extensive canvassing of many older authorities, including:

“The consequences attached to possession are substantially those attached to ownership, subject to the question of the continuance of possessory rights ... Even a wrongful possessor of a chattel may have full damages for its conversion by a stranger to the title, or a return of the specific thing.” Oliver Wendell Holmes

“The possessor need not have the further qualification of a title to possess. The facts of exclusive and exclusory control may be as true of a finder, borrower, pawnbroker, an honest non-owner who believes he is the owner, a trespasser, or even a thief, as they are of a true owner.” *Goodeve on Personal Property*, 8th ed., pp. 38-9

“If a finder has reason to believe that the thing is abandoned by its owner, then, whether or not it is so abandoned and whether or not a civil trespass is committed, there can be no theft at the first because there does not exist the belief that the appropriation will be invito domino which is essential for animus furandi. And a subsequent appropriation, even after discovery that the owner had no intention of abandonment, would seem to be within the principle of the immunity accorded by the modern decision to the pure finder. A taker upon a loss and finding may, like any other possessor, maintain trespass and theft and trover or detinue against a stranger.”

Pollock & Wright on Possession, 1888, p. 187

McRuer C. J. also stated that Bird was not a "true finder," that is, "the money was not found in a public highway or public conveyance or in any place to which the public had access by leave or licence.... It was not lost in the sense that a wallet is lost if dropped in the street." Thus: "The plaintiff had no right to remove it from the property of another, and undoubtedly was a wrongful taker." But, he continued, "it is not necessary for me to decide whether the taking was with felonious intent or not." This was because whether Bird was a "mere wrongful taker" (trespasser), or whether he had "felonious intent," - "in this case the same result flows." That is: "In my view the authorities with which I have dealt justify the conclusion that where A enters upon the land of B and takes possession of and removes chattels to which B asserts no legal rights, and A is wrongfully dispossessed of those chattels, he may bring an action to recover the same."

Bird certainly says that the trespass makes no difference as such, although note the qualification in the above statement in the words "to which B asserts no legal rights." It also seems to suggest that an intent to steal, or a theft, makes no difference either.

The question of what kinds of illegality, if any, vitiate finders' title probably remains unresolved as a matter of common law, although criminal statutes, including the Canadian *Criminal Code*, resolve the problem in some cases by requiring the confiscation of the proceeds of certain crimes when the possessor has been convicted.

A more general, common law, principle was enunciated in *Baird v. Queen in Right of British Columbia* (1992), 77 C.C.C. (3d) 365 (B.C.C.A.), for the court had no such statute to rely on because there was no conviction. A search of Baird's hotel room revealed some \$16,000 in cash and travellers' cheques which were identified as part of the proceeds of a robbery, and which Baird admitted were so. For reasons that do not concern us Baird was not prosecuted, and nor did the robbery victim want the money back. Baird thus applied for the return of the money from the crown. His lawyer relied on *Bird*, and argued that Baird "is entitled to retain possession against anyone, save the person from whom he may have wrongfully trespassed in acquiring them and save any person who can prove a superior title". The court distinguished *Bird* "as a kind of finders keepers case where there was not that degree of criminality or culpable immorality necessary to support" a claim that illegality should be a bar to recovery. It said that despite the lack of a conviction, "the conduct of Mr Baird giving rise to his claim is so tainted with criminality or culpable immorality that as a matter of public

policy the court should not assist him to recover”.

Did the court find a valid ground for distinguishing *Bird* from *Baird*? Is not a case like *Armory* also one in which the finder knew the property was not his? In *Baird* the crown had the money in its possession, and made a claim for *bona vacantia* - literally “vacant goods”, and a doctrine that holds that unclaimed property belongs ultimately to the crown. What if Baird had somehow got possession of the money again, and the court would thus not have been asked to “assist him to recover”? What if a third party, not the true owner, and not the original “finder”, had had possession?

The English Court of Appeal appears to have taken the opposite approach to the *Baird* court in *Webb v. Chief Constable of Merseyside Police*, [2000] Q.B. 427 (C.A.), and in doing so to have cast doubt on aspects of *Parker*. Webb had been in possession of money that the police believed was the proceeds of drug trafficking, but he was not convicted. Conviction would have triggered confiscation of the money, but in its absence the police claimed that they could keep it if they could establish, on the civil standard, that it was the proceeds of crime. The court disagreed, holding that a conviction was required and that “[t]he illegality of the means of acquisition of the money gave rise to no public policy defence to the claimants’ claim”. It continued: “if goods are in the possession of a person, on the face of it he has the right to that possession. His right to possession may be suspended or temporarily divested if the goods are seized by the police under lawful authority. If the police right to retain the goods comes to an end, the right to possession of the person from whom they were seized revives. In the absence of any evidence that anybody else is the true owner, once the police right of retention comes to an end, the person from whom they were compulsorily taken is entitled to possession”.

A distinction between *Baird* and *Webb* is that in the latter case the claimant did not admit to having acquired the property illegally. But *Webb* seems to enunciate a broader principle, and was read that way in *Costello v. Chief Constable of Derbyshire Constabulary*, [2001] 1 W.L.R. 1437 (C.A.). Costello was found in a stolen car, and it was established that he knew it was stolen. However, another man, also in the car at the time, was convicted of the theft, and the true owner was never traced. The court applied *Webb*, concluding that it stood for the proposition that at common law “possession means the same thing and is entitled to the same legal protection, whether or not it has been obtained lawfully or by theft or by other unlawful means”.

A recent case which clearly involved a “tinge” of illegality is *Thomas v. Attorney-*

General of Canada (2006), 64 Alta. L.R. (4th) 184 (Q.B.). Burton Thomas of Edmonton went one day to his rented Post Office box and discovered in it a Canada Post Express envelope containing \$18,000 in cash in 18 separate envelopes. He had opened it without looking at the addressee, and when he then did so he found that it was addressed to another Post Office box. He took the money to the police. To cut a long story short, the named recipient denied any knowledge of where the money had come from or why it had been sent to him, and the sender could not be located. Canada Post made no claim.

The attorney-general argued that it should keep the money, but the court rejected that. While the money may well have been the proceeds of crime, Thomas had committed no offence. And "even if [his] actions [in opening the envelope] could be viewed as wrong ... this should not disentitle him." Trussler J. acknowledged that "the case law is not clear about the effect of acquiring possession of an item by a wrongdoing," he was "inclined to follow" *Bird*. He cited *Baird*, but for the proposition that any wrongdoing in the current case "was inadvertent and not tainted by a high level of criminality." The crown's final argument was that public policy should operate to deny Thomas, in that "members of the public should be prevented from making claims on other peoples' mail and it is important to encourage due care of recipients when opening the mail." Trussler J. accepted that these were valid concerns, but they were "not pressing and substantial enough to disentitle Thomas."

E) ADVERSE POSSESSION OF LAND: GENERAL

INTRODUCTION

As we will see in chapter 4, the common law maintains the fiction that the ultimate ownership of all real property lies in the Crown, and no individual can "own" land. Instead, individuals have "title" to land. Nowadays title is invariably asserted through a document - a conveyance or a will. But historically possession was a very significant part of the law of title. First, in and of itself it provided a method of acquiring title to unoccupied lands. At common law factual possession, including possession which has no obvious rightful origin, gave a title to the possessor. Second, possession also provided a method of proving title against other claimants, of reinforcing title. In the medieval period possession was called seisin, and seisin was "fact not right". It "expressed the organic element in the relationship between man and land and as such provided presumptive evidence of ownership": Gray, *Elements of Land Law*, p. 53. Possession, it is often said, was the root of title.

This initial description of title at common law would not be complete without also noting an important corollary of it - that title to land at common law is relative. It cannot be absolute because the Crown owns all land, and therefore it was, and is, pointless to ask a court to decide who owns the land. Instead, one asked the court - of the two disputants before you, who has the better title? This can be illustrated by a simple example. A sold land to B who never occupied it; C occupied the land as vacant land; C was then forcibly dispossessed by D. B, C, and D all have a title, but some titles are better than others. C could sue D for recovery of the land, and if C did so the court would not inquire into whether there was somebody out there with a better title than C. B must take an action on his or her own account. C may have had no "right" to occupy the land, but "a wrongful possessor will be able to defend his possession against trespassers and adverse claimants who have no better right": McNeil, *Common Law Aboriginal Title*, p. 15.

While it fulfills nothing like as important a role as it once did, possession remains important in the common law of title to real property. Conceptually in registry systems "modern conveyancing rests to some degree on the assumption that proof of continued de facto enjoyment of land by the vendor and his predecessors provides a good root of title for the purchaser": Gray, *Elements of Land Law*, p. 59. More importantly for current purposes, it remains possible to acquire title to land at common law, good against all the world, through long possession. One way in which

this can be done is through the doctrine of aboriginal title, dealt with extensively later in the course. But it can also be done through the law of adverse possession.

Briefly, since the requirements for adverse possession are what the rest of this chapter is about, adverse possession means that uninterrupted enjoyment of land *of the correct nature over a period of time stipulated by law* by a squatter (non-owner) deprives the owner of his or her title and effectively gives to the squatter a title to the land, a title better than all others.

There are therefore two principal aspects of adverse possession law. The first is that of time. All jurisdictions in which it is possible to obtain title by adverse possession provide a statutory period during which a person claiming a title to land must act to recover the land from a wrongful possessor. That is why the rules relating to adverse possession are in the *Real Property Limitations Act*, which came into force in 2004. It replaced Part 1 of the old *Limitations Act*, which is the statute referred to in the cases, but did not alter any of the provisions. A claim of title by adverse possession is thus a defence to an action by someone with "paper title." Not all jurisdictions have the same time period. The following provisions tell you, *inter alia*, what the time period is in Ontario, and what "starts the clock running":

4) No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

5) (1) Where the person claiming such land or rent, or some person through whom that person claims, has, in respect of the estate or interest claimed, been in possession or in receipt of the profits of the land, or in receipt of the rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, the right to make an entry or distress or bring an action to recover the land or rent shall be deemed to have first accrued at the time of the dispossession or discontinuance of possession or at the last time at which any such profits or rent were so received.

5) (9) Where the person claiming such land or rent, or the person through whom that person claims, has become entitled by reason of any forfeiture or breach of condition, such right shall be deemed to have first accrued when the forfeiture was incurred or the condition broken.

13) Where any acknowledgement in writing of the title of the person entitled to any land or rent has been given to him or to his agent, signed by the person in possession or in receipt of the profits of the land, or in the receipt of the rent, such possession or receipt of or by the person by whom the

acknowledgment was given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent the acknowledgment was given at the time of giving it, and the right of the last-mentioned person, or of any person claiming through him, to make an entry or distress or bring an action to recover the land or rent, shall be deemed to have first accrued at and not before the time at which the acknowledgment, or the last of the acknowledgments, if more than one, was given.

15) At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action the right and title of such person to the land or rent, for the recovery whereof such entry distress or action, respectively, might have been made or brought within such period, is extinguished.

16) Nothing in sections 1 to 15 applies to any waste or vacant land of the Crown whether surveyed or not, nor to lands included in any road allowance heretofore or hereafter surveyed and laid out or to any lands reserved or set apart or laid out as a public highway where the freehold in any such road allowance or highway is vested in the Crown or in a municipal corporation, commission or other public body, but nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922.

36) If at the time at which the right of a person to make an entry or distress, or to bring an action to recover any land or rent, first accrues, as herein mentioned, such person is under the disability of minority, mental deficiency, mental incompetency or unsoundness of mind, such person, or the person claiming through him or her, even if the period of ten years or five years, as the case may be, hereinbefore limited has expired, may make an entry or distress, or bring an action, to recover the land or rent at any time within five years next after the time at which the person to whom the right first accrued ceased to be under any such disability, or died, whichever of those two events first happened.

Note that while possession by the adverse possessor must be continuous for the period of time, this does not mean that the same person must possess the land for all of that time. Provided there is no gap in possession, the rights acquired by the potential adverse possessor, the "inchoate possessory title," can pass from one person to another so that at the expiry of the limitation period "the last successor being then in possession will acquire a title in fee simple good against all the world including the true owner": per Bowen C.J. in *Mulcahy v. Curramore Ply. Ltd.* [1974] 2 N.S.W.L.R. 464 (C.A.). See also McRuer C.J.H.C. in *Fleet v. Silverstein* (1963), 36 D.L.R. (2d) 305 (Ont. H.C.): "[T]here is abundance of authority that is binding on me that where there has been adverse possession by 'A' as against 'B' which is surrendered to 'C' and 'C' immediately enters into possession of a right which has been handed over to him by 'A' the Statute of Limitations continues to run against the true owner".

The converse to this is also well established: that is, that if a squatter abandons the

land before the expiry of the limitation period the title holder "regains" full rights. He or she does not have to bring an action for recovery (there being no one in possession against whom to bring such action), nor will a later adverse possessor get the advantage of the previous possession unless his or her entry was substantially continuous with the previous squatter's departure: see *The Trustees, Executors and Agency Co. Ltd. v. Short* (1888), 13 App. Cas. 793 (P.C. - N.S.W.).

You might think about how these points help to illustrate the introductory comments above about possession being the root of title and about the relativity of title. The "trespasser" who has not stayed the correct amount of time has still acquired something, even if it is not a title that can be passed on other than by the successor immediately possessing the land.

The existence, and indeed the value, of an "inchoate possessory title" is illustrated by *Perry v. Clissold*, [1907] A.C. 73 (P.C. - N.S.W.). Under New South Wales expropriation legislation the government issued a notice of expropriation to one Frederick Clissold in 1891. Nothing further was actually done with the land, although the legislation provided that publication of the notice was sufficient to convey all rights in the land to the government, and Clissold died in 1892. In 1902 Clissold's heirs demanded compensation, but the Minister refused when it turned out that Clissold had entered the land in 1881. Although he fenced it and treated it as his own, and likely had sufficient "quality of possession" to obtain full title, he clearly did not have sufficient "quantity of possession" under the applicable statute. The case went to the Privy Council on the narrow question of whether a prima facie case for compensation was disclosed on the facts, and the court held that it was. "It cannot be disputed", Lord MacNaghten said, "that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner". The expropriation legislation provided for compensation "to every person deprived of the land" and "it could hardly have been intended ... that the Act should have the effect of shaking titles which ... would in process of time have become absolute ... or that ... Ministers ... should take advantage of the infirmity of anybody's title in order to acquire his land for nothing".

F) ADVERSE POSSESSION: THE QUALITY OF POSSESSION

INTRODUCTION

The next three sections explore what "quality" of possession is needed to establish an adverse possession claim. Generally, to make out the defense of adverse possession the squatter must show not only that he or she has been in continuous possession of the land for the requisite period of time, but also that the possession had been "actual and exclusive" possession in the manner of an ordinary owner, as well as open and notorious.

In *Re St Clair Beach* the court finds that the defence cannot succeed because the McDonalds did not have exclusive possession. The first question from the case is - why not?

Although the court does not come to a conclusion on the matter, it is likely that, if the title holder had gone out of possession, the MacDonalds would have been held to have sufficient possession. The second question you should consider, therefore, is - what arguments would you make that the McDonalds did physically possess the land as an ordinary owner would do?

However, even if the McDonalds were in possession in a physical sense, and even if the title holders had discontinued possession, the McDonalds would probably still not have won. Why not? See s. 13 of the *Act*.

One final point of introduction is necessary here. It was stated above that adverse possession doctrine serves as a defence, specifically as a defence to an action by a title owner to recover land occupied by a squatter. However, in *Re St Clair Beach* the claim for possessory title is made affirmatively. In fact, there are many cases in which an affirmative claim is brought by a squatter, and even though there is very little direct authority on the point it is reasonable to say that there is no procedural difficulty in doing so. In any event, the affirmative claim is made in this case as a direct result of the operation of the land titles system. A few explanatory sentences on systems of recording title are therefore necessary here. There are two such systems in common law Canada. Briefly, the registry system permits registration of all documents pertaining to land in the local registry office, but it does not require registration nor does it guarantee title. Prospective purchasers must therefore "search" the title by checking all the documents registered against a particular piece of land. By registering

an owner protects title against all unregistered documents but not against unwritten unregistered claims such as title acquired by adverse possession. This system was historically in effect in the Maritime Provinces, southern Ontario (generally), and parts of Manitoba. It is being converted, with the aid of computerisation, into a Land Titles system in many places.

In the other system, known as Land Titles or the Torrens system, the government guarantees title as shown on the record. When title to a particular piece of land is first recorded all outstanding interests in it are investigated and a certificate of title is issued. An insurance fund provides compensation for official errors. There is no need to search title in a Land Titles system: one merely obtains the official certificate of title. Land Titles is used exclusively in British Columbia, Alberta and Saskatchewan, in parts of Manitoba and in northern Ontario.

Many areas of the country that at one time used only the registry system now have both systems, with owners having an option. And this is the context for *Re St Clair Beach*. As stated in the opening paragraph, St Clair Beach Estates Limited applied for "first registration" under the *Land Titles Act*. The McDonalds objected, arguing that as a result of their long possession they, and not St Clair Beach Estates Limited, owned the disputed parcel.

RE ST CLAIR BEACH ESTATES LTD v. MCDONALD ET AL (1974), 50 D.L.R. (3d) 650 (Ont. Div. Ct.).

Pennell, J.: In this appeal the appellants (objectors), Donald M. MacDonald and Rim L. MacDonald, seek to reverse the order of His Honour Judge Zalev who dismissed an appeal by way of trial de novo pursuant to s. 29(1) of the Land Titles Act, R.S.O. 1970, c. 234, from the order of the Deputy Director of Titles that the application of the respondent (applicant), St. Clair Beach Estates Limited, for first registration under the Land Titles Act of certain land forming part of the Gore Lot, West of Pike Creek, in the Village of St. Clair Beach, in the County of Essex, be accepted.

The question to be determined is whether the appellants have established their claim to a possessory title of the land in question. Possession is a matter of fact depending on all the particular circumstances of the case. Therefore, I start from the facts as to which there is no dispute. Those facts, compendiously stated, are as follows:

cabin and I do not think that constructive knowledge can or should be imputed. The evidence is clear that the cabin was well hidden (and I do not infer that this was done deliberately) because it could not be seen from the air as far as we know, nor from the nearby river or ground area. That it was almost totally obscured may also be deduced from the fact that its location was unknown despite its proximity to Corner Brook, the Humber River and the Trans Canada Highway. Neither did the respondents bring forward any real evidence of knowledge in any other persons besides themselves and, presumably, their immediate families. In all of these circumstances, there is, in my view, insufficient evidence of open or visible or notorious possession within the meaning given these words by the Courts, so as to dispossess the legal title holder. I must, therefore, with respect, find that the learned trial Judge erred in fact and in law in reaching the conclusion he did. His order for the issuance of a restricted certificate of title must therefore be set aside and an unqualified certificate granted to the appellant for the land claimed by it.

NOTES

1) The judgment in *Lundrigans* states that not only did the trial judge hold that the squatters had the right quality of possession, he also gave them title to "a considerably larger parcel of land" than just the cabin. This was incorrect. An adverse possessor will normally gain title only to the land occupied, not to other land covered by the real owner's title.

However, if a person enters land under a defective title, and adversely possesses only part of the land for the requisite period, he or she will be considered to have been in constructive possession of the whole. This is called the doctrine of colour of title. See *Wood v. Leblanc* (1904), 34 S.C.R. 627 per Davies J. at 644: "the possession necessary under a colourable title to oust the title of the true owner must be just as open, actual, exclusive, continuous and notorious as when claimed without such colour, the only difference being that the actual possession of part is extended by construction to all the lands within the boundaries of the deed but only when and while there is that part occupation."

2) Possessory Title and Appurtenant Rights. Had the adverse possessors won in *Lundrigan's*, they would probably not have been able to get to their land without trespassing. The successful adverse possessor acquires only the land itself and not any rights appurtenant to it. The leading case is *Wilkes v. Greenway* (1890), 6 T.L.R. 449 (C.A.). Greenway had acquired land previously belonging to Wilkes by adverse possession, but needed to use a private road belonging to Wilkes in order to reach that land. He argued that he had also acquired an easement of necessity consisting of a right of way via the road. (We will deal with easements in a later chapter). The Court rejected Greenway's argument, noting that "there is nothing in the Statute of Limitations to create ways of necessity. The statute does not expressly convey any title to the possessor. Its provisions are negative only. We cannot impart into such negative provisions doctrines of implication [of easements of necessity]".

G) ADVERSE POSSESSION AND THE INCONSISTENT USE TEST: JUDICIAL REPEAL?

INTRODUCTION

In recent years a series of cases, in England and Canada, have appeared to restrict the ambit of adverse possession doctrine by giving a new meaning to what makes possession "adverse". The traditional position can be summarised simply as a restatement of the principles outlined above: exclusive possession as an ordinary owner would possess for the statutory period of time is adverse to the title holder. Or, as it was put in *Treloar v. Nute* [1976] 1 W.L.R. 1295 (C.A.), "if a squatter takes possession of land belonging to another and remains in possession for ... [the statutory period] to the exclusion of the owner that represents adverse possession". The new approach of requiring that the squatter's use be "inconsistent" with that of the title holder is illustrated by *Masidon Investments*.

MASIDON INVESTMENTS V. HAM (1984), 45 O.R. (2d) 563 (C.A.)

The judgment of the court was delivered by Blair J.A.: This appeal concerns a claim for possessory title to land. Specifically, the issues are whether the use made of the land by the appellant, the trespasser, was inconsistent with the use of the respondents, the legal owners, and whether the appellant had the required animus possidendi, the intention to exclude the respondents from possession. The Honourable Mr. Justice Carruthers rejected the appellant's claim and this appeal is taken from his decision....

The relevant facts, as found by Carruthers J. in his full and careful discussion of the evidence, can be briefly set out. The appellant, in 1956, became the tenant of an approximate 100-acre parcel of land owned by Louis Mayzel, located on the north side of the Queen Elizabeth Highway near Oakville. The land was mortgaged by Mayzel to a mortgagee who was a trustee for a group of investors consisting of the respondents or their predecessors in title. On September 26, 1967, the mortgagee registered a final order of foreclosure against the parcel. As a result of subsequent negotiations between the mortgagee and Mayzel, title to the west half of the 100-acre parcel was conveyed to a company controlled by Mayzel. Title to the east half, the lands in dispute in this appeal, remained in the mortgagee and in 1968 was conveyed to the respondents. The appellant continued as a tenant of Mayzel. The residence he occupied throughout is located on the west half but most of the other farm buildings and the access road leading to the residence are located on the disputed east half.

The appellant operated an airport consisting of two grass runways on the disputed property. The first runway was laid out in the late 1950s and early 1960s; the second runway was constructed between 1966 and 1972 and required extensive ditching, grading and the addition of dozens of large truckloads of fill. The appellant maintained the runways by regular cutting and the addition of fertilizer, loam and seed.

exclude the true owner will be evidenced by acts which effectively exclude the owner's possession. No such inferences can be drawn in this case.

The appellant's occupancy of the land was not justified by any suggestion of colour of right or mistake as to title or boundaries. Occupation under colour of right or mistake might justify an inference that the trespasser occupied the lands with the intention of excluding all others which would, of course, include the true owners. Such was not the case in this instance.

The acts of possession and the intention to possess are not mutually reinforcing in this case where the learned trial judge made such clear-cut findings against the appellant on both issues. There being abundant evidence to support his findings and no error in his application of the governing principles of law to them, it is not open to this Court to challenge or review them....For the foregoing reasons, I would, therefore, dismiss the appeal with costs.

[Leave to appeal this decision to the Supreme Court of Canada was refused: (1984), 27 A.C.W.S. (2d) 412.]

NOTES

1) In *Gorman v. Gorman* [1998] O.J. No. 1471 (C.A.) the inconsistent use test prevented a spouse from establishing title by adverse possession to the other spouse's interest. The Gormans had married in 1948 and separated in 1971. The wife stayed in the house with the children, the husband visited from time to time. They never divorced and despite occasional negotiations never came to an agreement whereby one party would buy out the other. The husband did propose moving back in in 1986, but his wife "rebuffed him." In 1996 the husband, then living in a senior citizen's home, applied for an order to sell the house and the wife defended the action by arguing that his interest was extinguished by the *Limitations Act*. The trial judge found that she had had actual possession for over twenty years, and that she effectively excluded her husband from the use he wanted to make of the property, which was to live in it. However, she failed to establish that she had the intention to exclude the husband from possession; as evidence of that the trial judge cited the various communications between the two over the years over selling the house or her buying him out. Those communications showed that she accepted that he had an interest in the house, and thus she was not intending to exclude him. The wife appealed on the question of whether such an intention needed to be proved, and the Court of Appeal held that it did in case other than mistake cases.

2) One might wonder whether an adverse possessor can ever meet the inconsistent use test. Occasionally they have succeeded, but always in unusual circumstances. In *Keil v. 762098 Ontario Inc et al* (1992), 91 D.L.R. (4th) 752 (Ont. C.A.) one party bought a lot of residential land and applied for a severance of part of it, for development purposes. In litigation over this severance it turned out that a neighbour was using part of the lot as a driveway, and had done so for over 20 years before the title owner bought the land. The Court of Appeal agreed with the title holder's argument that recent cases, especially *Masidon Investments*, had made it necessary "to demonstrate that use of the land by the occupant in possession is inconsistent with the form of use and enjoyment that the titled owner intended to make of it". The court summarised the title owner's argument thus: "the intended use was ... retention of the land in its present form until eventual development as a separate residential parcel. This use ... is not interfered with by the laying of gravel and the passage of vehicles". But the court also stressed that the owner's intention must relate to the time during which the limitation period was running. In this case the title owner had no intention when the period was running, because it did not own the land then. It was the prior owner's intention that mattered, and no evidence had been led on that.

Does this mean that the inconsistent use test actually helps adverse possessors when the title changes hands?

Another rare case of success for the adverse possessor is *Georgco Diversified Inc. v. Lakeburn Land Capital Corp.* (1993), 31 R.P.R. (2d) 185 (Ont. G.-D.) the plaintiff Georgco owned five contiguous plots of land on Hayden Street in Toronto, a street parallel to and south of Bloor Street East. The defendant Lakeburn owned land immediately to the north, on Bloor. Since 1953 the plaintiff and its predecessors in title had effectively occupied a strip 81 feet long and between two and a half and four and a half feet wide which according to registered surveys belonged to the defendant and its predecessors in title. Counsel for the defendant conceded that "the disputed lands have for a period of more than ten years been occupied by the plaintiffs and incorporated as part of the backyards of the plaintiffs' houses, have been landscaped as part of such backyards, and appear to have been boarded by fences". The trial judge held that the plaintiffs had had actual possession. Counsel for the defendant relied on *Masidon Investments*, arguing that "in order to establish that the claimant to adverse possession has effectively excluded the true owner from possession, the use by the claimant must be inconsistent with the intended use of the property by the true owner" and that "if the true owner had no intended use of the disputed land, the claimant cannot satisfy the

test of effective exclusion". Ground J. (really!) accepted that *Masidon Investments* was the case to be followed, and said this about the owner's intended use: "The evidence before this court would seem to indicate that, if [the defendant] ... had any intention at all with respect to the disputed lands, its intention as to use, at the highest, would be that no one should make use of the lands".

Given this conclusion, and assuming that "no one" included the owner, the plaintiff had established adverse possession because by any use of the land by anybody would be inconsistent with the intention that nobody use the land.

A recent case of a successful claimant is *Corporation of the Township of Lake of Bays v. 456758 Ontario Ltd* (2006) O.A.C. 85 (C.A.). From the 1940s the municipality had used land as a public park. In 1990 the president of the defendant corporation asserted ownership of the land which led to a verbal dispute with the municipality's officers, the latter denying the company's claim. Shortly thereafter the township erected a fence to keep the company out. The Court of Appeal found that the *Masidon* test had been met - the owner had been effectively excluded and the fence erected with the intention of excluding it.

3) There is language in *Masidon Investments* deprecating the fact that Ham deliberately tried to get the land via adverse possession. Is it appropriate to introduce notions of "fault" into this area of the law? In *Lehal v. Murray* (2001), 48 R.P.R. (3d) 304 (Ont. S.C.) Van Melle J., having found that the possessors' predecessor in title did not have exclusive possession and that therefore there had not been ten years of possession of the requisite quality, went on to say that the claimants would not have been entitled even if they had been there ten years. The judge's reasons on this point rely heavily on the fact that the Murrys knew it was not their land, but they nonetheless used it. This fact "disturbed" the judge, who believed that "once the Murrys understood the concept of adverse possession", they set out to establish it and to enlarge their claim. The judge said: "Adverse possession is not a mechanism whereby someone can convert to his or her own use property belonging to his or her neighbour. This is not a case of mutual mistake or inadvertence. There is a course of conduct by the Defendant and her husband apparently designed to appropriate property belonging to someone else.... [Their actions were] entirely consistent with a course of conduct designed to 'take over' someone else's property, but not consistent with a legitimate claim for adverse possession". An appeal to the Court of Appeal was dismissed, although without reference to these issues: (2002), 5 R.P.R. (4th) 34 (Ont. C.A.).

(H) RETREAT FROM THE INCONSISTENT USE TEST

INTRODUCTION

The biggest problem with the inconsistent use test is revealed by thinking about the discussion of intention in *Beaudoin*, a case decided before *Masidon Investments*. In *Beaudoin* the court held that the adverse possessor could not be required to intend to exclude the true owner specifically, since he mistakenly believed that he was the owner. Similarly, the possessor cannot effectively exclude the owner if the parties are mistaken about title, because the true owner cannot have a use for the land if he or she does not believe that he or she is the owner.

The *Teis* case deals with the inconsistent use in a case of mistake. You will see that some play is given to aspects of the rationales for adverse possession discussed above in the Merrill article.

TEIS V. ANCASTER TOWN (1997), 35 O.R. (3d) 216 (C.A.)

The judgment of the court was delivered by Laskin J.A.: John and Elsie Teis claimed possessory title to two strips of land -- the "ploughed strip" and the "laneway" -- located on the western edge of Jerseyville Park, a public park owned by the Town of Ancaster and used mainly to play baseball. For more than 10 years, both the Teises and the Town mistakenly believed that the Teises owned these two strips of land. In a judgment dated January 18, 1994, Lazier J. declared that the Teises were owners by adverse possession of the ploughed strip and the laneway but that the public was entitled to travel over part of the laneway by car and all of the laneway by foot. The Town appeals and asks that the Teises' action be dismissed. The Teises cross-appeal and ask to delete that part of the judgment granting the public a right of way over the laneway.

The main issue on the appeal is whether a person claiming possessory title must show "inconsistent use" when both the claimant and the paper title holder mistakenly believe that the claimant owns the land in dispute. Inconsistent use means that a claimant's use of the land is inconsistent with the true owner's intended use of the land. The other issue on the appeal is whether the trial judge made a "palpable and overriding error" in holding that the Teises had "actual possession" of the disputed strips for the ten-year period prescribed by the Limitations Act, R.S.O. 1990, c. L.15.

In my opinion, the test of inconsistent use does not apply to a case of mutual mistake and the trial judge did not err in finding actual possession. Accordingly, I would dismiss the appeal. I would also dismiss

CHAPTER FOUR

INTRODUCTION TO THE COMMON LAW OF REAL PROPERTY

THE DOCTRINES OF TENURE AND ESTATES

A) INTRODUCTION TO TENURE AND ESTATES

Although much of the system of tenure explained below is obsolete, a basic understanding of the historical origins of the English law of real property is indispensable to an understanding of the conceptual bases of that law in common law Canada. As in England, land "owners" in Canada are still not true owners, but are tenants in fee simple of the crown.

K. Gray, Elements of Land Law

It is not easy to imagine, *tabula rasa*, how best to construct a coherent and systematic body of rules governing rights in and over land. During the course of eight centuries, English law has developed a framework of rules which functions today with admirable success, but it is far from obvious that, if the task of construction were begun again, the end result would necessarily resemble the law of real property in its present form. The conceptual points of departure which lie at the back of the law of real property contain little, if anything, of a particularly compelling or a priori nature. There is indeed nothing inevitable about the eventual shape of modern land law, but it remains true that the law of today is still heavily impressed with the form of ancient legal and intellectual constructs From its earliest origins land law has comprised a highly artificial field of concepts, defined with meticulous precision, with the result that the inter-relation of these concepts is not unlike a form of mathematical calculus. The intellectual constructs of land law move, as Professor Lawson once said, 'in a world of pure ideas from which everything physical or material is entirely excluded'. The law of land is logical and highly ordered, consisting almost wholly of systematic abstractions which 'seem to move among themselves according to the rules of a game which exists for its own purposes.' It is from this interplay of naked concepts that the creature of modern land law ultimately derives. English law cannot be properly understood except in the light of its history, and it is in the doctrines relating to tenures and estates that the historical roots of English land law are to be found.

The Doctrine of Tenures The origin of the medieval theory of English land law was the Norman invasion of England in 1066. From this point onwards the King considered himself to be the owner of all land in England. Since the Normans brought with them no written law of land, they initiated in their newly conquered territory what was effectively a system of landholding in return for the performance of services. According to this feudal theory, all land was owned by the Crown and was granted to subjects of the Crown only upon the continued fulfillment of certain conditions. Land was never granted by way of an actual transfer of ownership, and the notion of absolute ownership other than in the Crown was therefore inconceivable. Pollock and Maitland were later to explain quite simply that all land in

Note on Presumptions and Words of Limitation

An individual owning a fee simple estate can obviously choose, when divesting him or herself of it, to simply give the full fee simple estate to the grantee. Or he or she could choose to give some lesser estate, such as a life estate, to the grantee. And if the words used in the will or conveyance (deed) are clear as to what is being transferred, there will be no problem in determining what was intended.

But what if the terms of any instrument - an *inter vivos* transfer (a transfer from a living person) or a will - leave uncertain what was intended? Because of the importance of land in the medieval world the common law required strict adherence to conveyancing formulae if a person wished to transfer *inter vivos* an estate in fee simple. The grant had to say: "to A and his heirs." Any other form of words - "to A in fee simple, to A forever, to A and his successors" - would create only a life estate.

Note that in the phrase "to A and his heirs" the words "to A" are known technically as words of purchase, words that designate the person to whom the interest is granted. The words "and his heirs" are called words of limitation, words that designate the nature of the interest granted.

The strict common law rule on conveyancing has long been altered by statute. The *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C-34, s. 5 states:

- 5 (1) In a conveyance, it is not necessary, in the limitation of an estate in fee simple, to use the word "heirs".
- (2) For the purpose of such limitation, it is sufficient in a conveyance to use the words "in fee simple" or any other words sufficiently indicating the limitation intended.
- (3) Where no words of limitation are used, the conveyance passes all the estate, right, title, interest, claim and demand that the conveying parties have in, to, or on the property conveyed, or expressed or intended so to be, or that they have power to convey in, to, or on the same.
- (4) Subsection (3) applies only if and as far as a contrary intention does not appear from the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.
- (5) This section applies only to conveyances made after the 1st day of July, 1886.

NOTE. This statute was not passed in 1990. As the note says, this has long been the rule. Every so often provincial and federal statutes are consolidated and re-passed so that the

original statute and all its amendments are in place. These are called 'Revised Statutes', hence RSO stands for Revised Statutes of Ontario.

The alienation of realty by will was treated differently at common law. Land was not devisable at all until the passage of the *Statute of Wills*, 1540, and thereafter the courts took a more lenient view of the need for correct words of limitation, a view based on the rule that wills are to be construed in an attempt to find the true intention of the testator or testatrix. A similar provision to the one cited above is now to be found in the *Succession Law Reform Act*, R.S.O. 1990, c. S-26, s. 26, which states:

26. Except where a contrary intention appears by the will, where real property is devised to a person without words of limitation, the devise passes the fee simple or the whole of any other estate or interest that the testator had power to dispose of by will in the real property.

(C) PRESENT AND FUTURE INTERESTS

The preceding pages demonstrate that the estates system recognizes a variety of different interests in land. The next sections will show that the common law also allows for conditional estates, interests in land which may either not arise until the happening of a certain event or which may be terminated in the future by the occurrence of a certain event. Once we know that it is possible to have an interest in land less than the fee simple absolute (life estate, fee tail, conditional fee simple), the next question is - what happens to the rest of the fee simple absolute in any given piece of realty? The answer is that the law recognizes future interests in land, interests held by persons other than those in possession in the present. In fact, the common law recognizes two types of future interests: a reversion and a remainder.

A reversion is any interest retained by the grantor: for example, in the grant "to A for life" the grantor, assuming that he or she holds the fee simple absolute, has not disposed of his or her full interest. The grantor has a reversion in fee simple. A reversion does not need to be specified, it arises by operation of law from the failure by the grantor to alienate the entire interest.

A remainder is an interest created in a third party which follows the granting of an estate less than the fee simple absolute. For example, in the grant "to A for life, then to B", B has a remainder in fee simple but no right to possess the land until A dies. Note that in this example the grantor has no reversion -- he or she has given away the full fee simple.

K. Gray. Elements of Land Law

Through the doctrine of estates the common law was able to organise the allocation of certain powers of management, enjoyment and disposition over land in respect of particular periods or 'slices' of time. Moreover, as the law of real property became distanced from the physical reality of land and entered a world of almost mathematical abstraction, it was possible to accord an immediate conceptual reality to each 'slice' of time represented by an 'estate'. In other words, any particular 'slice' of entitlement in the land could be viewed as having a present existence, notwithstanding that its owner was not entitled to possession of the land until some future date. In a world of concepts it was quite easy to conceive of rights to successive holdings of the land as 'present estates coexisting at the same time'. It was ultimately this feature of the time-related aspect of the 'estate' in land which made it possible for the common lawyer to comprehend the notional reality of immediate dispositions of, and dealings with, future interests in land

Precisely because the doctrine of estates recognised the feasibility of successive estates in the same land, rules were developed ... to restrain the current estate owner from prejudicing the value of the land

in the hands of any successor (or 'remainderman'). These rules took the form of a doctrine relating to 'waste', 'waste' being deemed as any action or inaction on the part of the estate owner which altered the physical character of the land. Waste can be committed in several ways, although not all forms of waste lead to any legal remedy. The courts have been unwilling, for instance, to restrain the commission by a tenant for life of ameliorating waste, which merely has the effect of improving the land and of enhancing its value. Only if the terms of his grant so stipulate can a tenant may be made liable for permissive waste, which comprises defaults of maintenance and repair leading to the dilapidation of buildings situated on the land. More serious is voluntary waste, which includes any positive diminution of the value of the land (for instance, by quarrying or by the cutting of timber). A tenant for life is liable for such waste unless the terms of his grant give him specific exemption by declaring him 'unimpeachable for waste'.

Note that the above is a very cursory discussion of future interests. The area is a lot more complicated and technical than this, but given that this is an introductory course I do not think it necessary or useful to go into all of the details. Those who like to use the Ziff book will find a good review of the area in chapter 7 of the fourth edition.

PROBLEMS

In answering these questions consider both what kind of estate a person has, and whether it is one of present or future possession.

- 1) A has a fee simple estate and executes a deed stating: "I give my land to B". What estate does B have, and why?
- 2) A has a fee simple estate and makes a will stating: "to B for life, and on the expiry of B's life to C for life". What interests do A, B and C have?
- 3) A has a fee simple estate and makes a will stating: "I give my land to B for the life of C, then to D for life, then to E. What interests do A, B, C, D and E have? What happens if B dies before C?

D) INTRODUCTION TO CONDITIONAL ESTATES

We have seen that estates in land are temporal 'slices' of the rights to the possession, use and enjoyment thereof. So far we have considered these estates as 'absolute', as belonging unconditionally to someone. Estates may, however, be granted subject to conditions. Conditions can be of two kinds.

Conditions Precedent. First, there can be conditions of eligibility, or what are known technically as conditions precedent. These must be satisfied before the grantee has any right of enjoyment at all. For example: 'to A at 21', or 'to B for life if she should marry Y'. Until A turns 21, or until B marries Y, they have only what are called *contingent* interests. If either die before the condition is met, or if the condition becomes impossible of performance (for example, if Y dies before B marries him) the interest will be extinguished and there is nothing that can pass to heirs. Conversely, if A becomes 21, or if B marries Y, then the condition is satisfied and the interest becomes a *vested* interest.

This does not mean that the owner of a vested interest has an immediate right to possession. That is the case in the two examples given above, but it is not so in the grant "to A for life, then to B for life if she reaches 21". At the time of the grant, assuming B is not 21, her interest is contingent. If she reaches 21 while A is still alive, her estate becomes *vested in interest*, but she has no right to possession until A dies.

It should be noted here that the common law generally favours early vesting where there is any doubt about whether a grantor or testator/testatrix intended to create a vested or contingent interest. *Mackay v. Nagle et al* (1988), 30 E.T.R. 191 (N.B.Q.B.) illustrates this point. The testator left his property to his wife for life "and thereafter to my living children in equal shares". His four children were alive when the will took effect, but one died during his widow's lifetime. Did the word "living" mean children alive at the time the will took effect, in which case the now-deceased child's interest would be vested and would descend to his heirs? Or did it mean living at the time the widow's life estate expired, in which case it would be a contingent interest, the condition precedent being surviving the widow? In coming to the conclusion that the interest was vested, the court considered extrinsic evidence of the testator's intention when the will was made. But it relied largely on a series of cases establishing the principle that, in ambiguous cases, "the courts generally follow a rule of construction favouring early vesting".

Conditions Subsequent. The second kind of condition, the one that will principally concern us here, is a condition of defeasance, known as a condition subsequent. These operate to defeat an estate which has already vested. For example: 'to C in fee simple, but if he ever becomes a member of the Law Society of Upper Canada, to D in fee simple'. If C acquired the land in 1960 with this condition attached, the estate was vested at that time but was liable to be divested at a future date if C became a lawyer.

These conditions of defeasance are personal if they relate to the person; if C died in possession and never having joined the legal profession, his heirs will inherit a fee simple absolute. But they are not personal, will go with the land, if the condition relates to use of the land itself.

While I have used the term "fee simple" here, any estate can be made subject to conditions.

There are two kinds of conditions subsequent, which are conceptually distinct and which have different consequences if the condition is breached or found invalid. This is an area of excessive technicality which, as with future interests generally, I choose to skip over. More about it can be found in Ziff, *Principles of Property Law*, fourth edition, pp. 222-225. For current purposes you need only to know the distinction between a condition precedent and a condition subsequent.

E) CONDITIONS AND UNCERTAINTY

This section and the next consider why the courts will intervene and declare a condition to be void. Broadly speaking one can delineate two reasons why courts will strike down conditions: the condition is either uncertain, or it is contrary to public policy.

In addition to considering the formal rules on these criteria, you should read the cases bearing in mind that conditional estates provide an excellent illustration of the relationship between property and power. If the law were to allow grantors to impose any conditions they wished, that would have the effect of increasing the number of strands in every land owner's bundle of rights. But that would also give those land owners substantial power over subsequent land owners (successors-in-title). Often conditions are imposed by one generation on the next, and this issue of controlling the next generation in this way is often referred to "dead hand from the grave" problem - the dead person's hand is permitted to reach out from the grave and control the life of his or her beneficiary. See here the testator's desire to limit his daughter's choice of marriage partner in *Clayton v. Ramsden*. Moreover, it is also the case that a legal regime which did not restrict the content of conditions would permit private power to advance ends that are unacceptable if pursued in the public sphere: *Re Noble and Wolf* and *Re Canada Trust and Ontario Human Rights Commission* both raise this problem.

The next two cases deal with uncertainty. Consider what degree of "uncertainty" appears to be required, and why? Neither case is about land, but the rules on uncertainty are the same whether realty or personalty is involved.

SIFTON v. SIFTON, [1938] 3 All E.R. 435 (P.C. - Ont.)

Lord Romer: This is an appeal from a judgment of the Court of Appeal for the province of Ontario, which varied a judgment of Middleton, J.A., given upon an application by way of originating motion brought by the respondents, Clifford Sifton and Wilfred Victor Sifton, the surviving trustees of the will of Clifford Winfield Burrows Sifton, deceased. By the motion the trustees sought the opinion, advice and direction of the court on certain questions arising in the administration of that testator's estate. The testator died on June 13, 1928, leaving him surviving his widow, the respondent Mabel Gable Sifton, and his daughter and only child, the appellant, who was then of the age of 13 years. The will (dated July 12, 1926), after bequeathing the testator's furniture and effects to the appellant, continued as follows:

I give devise and bequeath all other property real and personal to my executors upon the following trusts namely to manage the corpus of the estate in accordance with their best judgment continuing any

the tenets and observed all the rules would assert that some of the individuals I have mentioned were certainly not of the Jewish faith. It would surely depend on the extent to which the particular individual accepted the tenets and observed the rules. I cannot avoid the conclusion that the question whether a man is of the Jewish faith is a question of degree. The testator has, however, failed to give any indication what degree of faith in the daughter's husband will avoid, and what degree will bring about, a forfeiture of her interest in his estate. In these circumstances the condition requiring that a husband shall be of the Jewish faith would, even if standing alone, be void for uncertainty. I would allow this appeal.

NOTES

1) In *Re Down* (1968), 2 O.R. 16 (C.A.) the testator's will provided in part:

When my said son, Harold Russell Down, arrives at the age of thirty years, providing he stays on the farm, then I give, devise and bequeath all of my estate both real and personal of every nature and kind whatsoever and wherever situate unto my said sons Stanley Linton Down and Harold Russell Down to be divided between them equally share and share alike.

Harold Down, 26 years old and not farming, applied for construction of the will in order to ascertain his rights to his father's estate. The trial judge held that the will created a condition precedent not void for uncertainty. Harold Down appealed, arguing that he had a contingent interest which would vest when he reached 30, attached to which was a condition subsequent which was void for uncertainty.

Do you think the appeal should succeed?

2) In *Blathwayt v. Lord Cawley and Others*, [1975] 3 All E.R. 625 (H.L.) the court considered the validity of a condition which prohibited future heirs of the testator from inheriting, or divested the estate once inherited, if any of them should "Be or become a Roman Catholic". Following *Clayton v. Ramsden*, is this uncertain?

F) CONDITIONS AND PUBLIC POLICY

The next two cases deal with the meaning of "contrary to public policy". This is a difficult notion to define. It includes conditions contrary to law - which means both conditions mandating an illegal act and conditions which seek to subvert the course of law. An example of the latter is a condition providing for divestment if the grantee becomes a bankrupt. The bankruptcy law of the jurisdiction, not the grantor, provides for the disposition of property on bankruptcy: see *Re Machu* (1882), 21 Ch. D. 838.

Beyond this category, it is difficult to say why the content of certain kinds of conditions attracts judicial disapprobation as contrary to "public policy" and others do not. The best one can do is to describe categories and ascribe the choices traditionally made to the values of the English judiciary. Looking at the cases as a whole, most conditions traditionally held to be invalid as against public policy were considered so because they represented restraints on marriage, conditions encouraging divorce or separation, conditions affecting parental duties, or restraints on alienation. We will not discuss the first three categories any further, and the latter is dealt with at the end of this chapter.

The issue of concern here is the relationship between private property, public policy, and what we now call unacceptable discrimination. As you will have gathered from *Clayton v. Ramsden*, "discrimination" has not traditionally been a reason for voiding conditions. The racial and religious distinctions made in the will in that case attracted little comment. *Re Noble and Wolf* deals explicitly with the validity of discriminatory terms - consider in particular the line drawn by the court between private choice and public policy and the concern expressed, especially by Hogg J. A., about not inventing new grounds of public policy. Consider also, by way of contrast, how both concerns are dealt with by the court in the much more recent *Re Canada Trust* case.

You should note that neither of these two cases involves a condition attached to land. *Noble and Wolf* is about a restrictive covenant, a topic we will cover in a later chapter. *Re Canada Trust* is about a charitable foundation and personal property. Do not concern yourselves with these distinctions; the purpose of the cases is to consider what should be the scope of "public policy".

[Hogg J.A. then cited cases for the proposition that words in a covenant were to be read with "regard ... to the object which they were designed to accomplish" and "in an ordinary or popular and not in a legal and technical sense".]

In his very carefully prepared argument, one of the matters referred to by Mr. Morden was the fact that those who are responsible for the Dominion census ascertain, for the various territorial divisions of Canada, the population and the classification of that population, under various heads, including nationality and race. The information from which such classification is made is obtained through the inquiries made by census commissioners, enumerators or agents It would not be possible for those whose duty it is to obtain information in taking a census of the population to ascertain the precise degree or percentage of any race or blood in an individual. The classification must necessarily be made having regard to the word "race" in its ordinary and popular sense. If the language of cl. (f) of the covenant is regarded in its ordinary and popular sense, this clause cannot be said to be void for uncertainty because the exact degree of race or blood in any person among those set out in the aforesaid clause can not be ascertained For the reasons I have given, I think the appeal should be dismissed, with costs against the appellants.

NOTES

1) Following the Court of Appeal's decision in *Re Noble and Wolf* the Ontario legislature amended the *Conveyancing and Law of Property Act* by adding the following section [now s. 22]: "Every covenant made after the 24th day of March, 1950, that but for this section would be annexed to and run with land and that restricts the sale, ownership, occupation or use of land because of the race, creed, colour, nationality, ancestry or place or origin of any person is void and of no effect. " Consider precisely how this would affect the covenant in *Re Noble and Wolf*?

2) An appeal of the Ontario Court of Appeal decision was allowed by the Supreme Court of Canada, but principally on the ground that the covenant did not satisfy the requirements of an enforceable restrictive covenant: see *Noble v. Alley*, [1951] S.C.R. 64. (Note that we will deal with restrictive covenants later in the course). Four of the seven judges also stated, as an alternative ground of invalidity, that the covenant was uncertain.

3) For a full discussion of this case and its context, see J. Walker, "Race". *Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Toronto: Osgoode Society for Canadian Legal History 1997), chapter four.

NOTES

1) A number of Canadian cases have dealt with conditions and public policy in the context of inherent characteristics or beliefs. Consider whether the following would have been decided differently had the courts had the reasoning of the Ontario Court of Appeal in Re Canada Trust and Ontario Human Rights Commission before them?

a) In Re Rattray (1973), 38 D.L.R. (3d) 321 (Ont. H.C.), affd. (1974), 44 D.L.R. (3d) 533 (C.A.) approximately \$13M was left to Queen's University to provide scholarships or bursaries. One of the conditions was that they should not be awarded "to any student who is a communist, socialist or a fellow traveller". On an application by the University the condition was struck down for uncertainty. The case generated some publicity and a letter writer to the Globe and Mail, 17 September 1973, said in part: "The university ... had no qualms about accepting the money on this basis. Now that ... Rattray is ... dead they apparently find it morally proper to alter his conditions, without the acceptance of which the money would not have been given to them in the first place[H]is money will henceforth be made available to persons whose political philosophy he deplored, even though he took pains to develop the point that it should not. I believe this court's decision should be appealed, not only to safeguard the intents of the deceased person who has given so generously, but to safeguard the inviolability of trust funds in general and the intents that gave them birth".

On the issue of uncertainty, the letter writer agreed that there "is ... no precise definition" of terms like socialist, communist, or fellow traveller. But the problem could be dealt with by asking each student who applied to the fund: "can you in conscience subscribe to its intent in accepting this scholarship"?

b) In Re Hurshman (1956), 6 D.L.R. (2d) 615 (B.C.S.C.) the testator left property which his daughter would inherit "provided she is not at that time [the time when the will took effect] the wife of a Jew". This will was made a month after Mr. Hurshman's daughter married Ivan Mindlin, who all parties to the case agreed was by "lay definition" Jewish. McInnes J. held that the condition "is directly contrary to public policy" because "in order for the daughter to inherit she must divest herself of her husband".

c) Re Metcalfe (1972), 29 D.L.R. (3d) 60 (Ont. H.C.) involved a testator who provided for a scholarship fund in his will. McGill was to provide a scholarship for a male medical student unable to finance his own studies, who was a Protestant of good moral character, had received a high school education in Ontario, and had shown athletic ability. When the university was informed of this it disclaimed the gift, stating

in a letter that "our Scholarship Committee ... will not recommend acceptance of discriminatory gifts such as this for ' a Protestant of good moral character, educated in Ontario and who possesses athletic ability' "

Any recipient of property is entitled to disclaim, and that might have been the end of the matter. However, the testator's widow argued that the gift should stand as one given to charity, that McGill was only the selector of the recipient, not the recipient itself, and that the court should appoint another "selector". After construing the precise terms of the bequest the court held that McGill was really the recipient, and that the gift therefore failed.

2) The Ontario Human Rights Commission takes the position that "[s]cholarships or awards that designate a specific minority or ethnic group infringe the [Human Rights] Code, unless they qualify as a "special program" that is designed to relieve economic hardship or disadvantage, or designed to achieve equality of opportunity." Elsewhere it states that "this policy applies whether the organization or body conferring the scholarship or award is public or private. It also applies to trusts." A preliminary issue in the Re Canada Trust case had been whether the Commission had jurisdiction over the Leonard Foundation, and the Court of Appeal had held that it did not.

3) Two recent charities cases have referred to the Re Canada Trust decision. In Re Ramsden Estate (1996), 139 D.L.R. (4th) 746 (P.E.I.S.C.-T.D.) at issue was a bequest to the University of Prince Edward Island to create bursaries or scholarships to be awarded "to protestant students". Beyond this preference, nothing else was stated as to why the testatrix had chosen as she did. The court first found that this could not be given effect to because the University Act, R.S.P.E.I. 1988, c. U-4 prohibited the University from administering any such funds, on the grounds that they required the imposition of a "religious test". However, it went on to find that the fund could be administered by some other body and thus achieve the same purposes. That brought into play the question of whether the trust established by the bequest was generally contrary to public policy, and the court held that it was not, in the process not even referring to the apparent "public policy" of non-denominational University scholarships. With reference to the Leonard Foundation case, the court said: "that case is distinguishable from the present one, in that the trust in that case was based on blatant religious supremacy and racism. There is no such basis for the trust in this case". Thus "motive" seemed to play a large role.

In a more recent case, University of Victoria v. The Queen (2000), 185 D.L.R. (4th) 182 (B.C.S.C.), a woman had left the University money to establish two bursaries, one for "a practicing Roman Catholic student" in education and the other in music for "a Roman Catholic student". The court dealt with two issues. First, it decided that the terms did not violate the Human Rights Code of the province because the trust fund did not constitute a "public" relationship between the University and the public. Here the University was simply the trustee appointed under the will of a private citizen to give effect to a private bequest. Second, it held that the terms did not violate public policy. That doctrine should be invoked "only in clear cases", and "the terms of the scholarship in Re Leonard are clearly offensive and distinguishable from those before me". The court had "no hesitation in concluding that a scholarship or bursary that simply restricts the class of recipients to members of a particular religious faith does not offend public policy". It is unclear whether the distinction drawn by the court between this case and Canada Trust was motive, or the fact that religion only was involved, or both.

4) An unusual public policy case is Re Wishart Estate (1992), 46 E.T.R. 311 (N.B. Q.B.) Clive Wishart's will directed that his four horses were to be given to the RCMP to be shot. His executors applied to the court for directions, and the case received much publicity, with a number of petitions asking that the provision not be carried out. The evidence at trial showed that Wishart was very fond of the horses and was concerned that they would be badly treated after he died. The New Brunswick S.P.C.A. undertook to care for the horses, and Riordan J. held that the animals should be given to them and thereby Wishart's real intention would be carried out. But he went on to say that the provision was in any event contrary to public policy. Public policy was "difficult to define" and "can be ... subjective", he said, eschewing the usual "unruly horse" metaphors. In this case the direction to destroy the horses served "no useful purpose". It would "benefit no one and be a waste of resources and estate assets".

5) The relationship between the right of an owner to do what he or she wants with property and anti-discrimination law was addressed directly in L'association A.D.G.Q. v. Catholic School Commission of Montreal (1979), 112 D.L.R. (3d) 230 (Que S. C.). The Commission offered to the public generally weekend rentals of its buildings. But it refused to rent them for a weekend conference to L'Association A.D.G.Q. because, in the words of Beauregard J., "petitioner is an organization that has as its principal object the organizing of homosexual men and women in order to defend their interests" and "respondent submits that homosexuality is a practice which is condemned by the highest authorities of the Catholic Church, and that consequently the exclusion of petitioner as a lessee is justified by the religious or educational character of respondent, a non-profit institution." The court considered three provisions of Quebec's Charter of Human Rights and Freedoms:

Section 6: Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.

Section 10: Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction exclusion or preference based on race, colour, sexual orientation, sex, civil status, religion, political convictions, language, ethnic or national origin or social condition. Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

Section 12: No one may, through discrimination, refuse to make a juridical act concerning goods or services ordinarily offered to the public.

From these provisions the court concluded that "whatever may be the justification of respondent's decision on other than legal grounds, the refusal contravenes s. 12 of the Charter of Human Rights and Freedoms." The Commission, however, argued that its action was saved by section 20 of the Charter, which reads: "A distinction, exclusion or preference based on the aptitudes or qualifications required in good faith for a job, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory."

Beauregard J. dealt with this argument as follows: "While I accept that, as a question of fact, homosexuality is a practice which is condemned by the highest authorities of the Catholic Church, and that respondent is a non-profit institution which has as its object to provide Catholic education, I am of the opinion that, within the confines of the present case, respondent has not succeeded in showing that it should benefit from

the exception provided by s. 20 of the Charter. One may certainly imagine cases where respondent might invoke s. 20 of the Charter and refuse to contract with another person by alleging an exclusion justified by its religious or educational character. There is no point, however, in evoking these cases here Interpreted strictly, s. 20 does not say that s. 10 does not apply to nonprofit institutions which have an educational or religious character, but it does say that an exclusion invoked by a non-profit institution must be "justified" by the religious or educational character of that institution. If there exist effectively in a given situation certain facts which would make such an exclusion, in the eyes of the directors of a nonprofit institution acting in good faith, a logical and rational consequence of its religious or educational character, it is not for the Courts to put themselves in their place and exercise the discretion which is theirs. But in the complete absence of a rational connection between the religious or educational character of an institution and a discriminatory practice, it falls to the Courts to intervene in order to sanction such practices.

In the present case, respondent has decided to offer to the general public the rental of its buildings. Respondent has even granted leases to non-Catholic churches and atheist or agnostic political parties. On the fringes of this more or less commercial practice I see no connection between respondent's religious or educational character and its decision to exclude the petitioner association as a lessee on account of the ideas which this group advances [T]he real problem is this: respondent refuses to rent to petitioner because it apprehends the deleterious effect which the rental of a building to a homosexual association would have on its Catholic students, it being accepted that homosexuality is a practice condemned by the Catholic Church. It is thus an apprehension which is perhaps justified but not permissible with respect to ss. 12 and 10 of the Charter of Human Rights and Freedoms."

6) In Fox v. Fox Estate (1995), 10 E.T.R. (2d) 229 (Ont. C.A.) a testator left his widow and executor, Miriam, a life interest in 75 per cent of his estate. She was also his executor and trustee, and in that capacity had a power to use the capital ("encroach" on it) for the benefit of his grandchildren. What was left of the estate after the widow's death was to go to the testator's son Walter. Walter had two children by his first marriage, and in 1989 decided to marry again to a woman who was his secretary and not Jewish. Miriam Fox did not like this, and used the power of encroachment she held as a trustee to give her grandchildren almost all the residue of the estate. The Court of Appeal disallowed her actions, and the case is largely concerned with the law relating to the discharge of their duties by trustees - specifically about the use of "extraneous" considerations when exercising a discretionary power. But one of the three judges, Galligan J.A., accepted the trial judge's finding that the widow was

motivated by dislike of Walter's choice of marriage partner, specifically the fact that she was not Jewish. He then stated, inter alia: "It is abhorrent to contemporary community standards that disapproval of a marriage outside of one's religious faith could justify the exercise of a trustee's discretion. It is now settled that it is against public policy to discriminate on grounds of race or religion". As authority for this last sentence he cited the Canada Trust case. He then stated: "If a settlor cannot dispose of property in a fashion which discriminates upon racial or religious grounds, it seems to me to follow that public policy also prohibits a trustee from exercising her discretion for racial or religious reasons". Galligan J. A. acknowledged that while there were past decisions which "upheld discriminatory conditions in wills", counsel in the present appeal had not been prepared to argue that these were still correct, that "any court would today uphold a condition in a will which provides that a beneficiary is to be disinherited if he or she marries outside of a particular religious faith".

Do you think this is a correct reading of the Canada Trust decision? Do you think this ought to be the law? Galligan J.A. accepted that as a practical matter a testator could choose not to benefit somebody because of dislike of the religion of their spouse, but thought that irrelevant: "The exercise of a testator's right of disposition is not subject to supervision by the court. But a trustee's exercise of discretion is subject to curial control".

7) The following story appeared in the *Wall Street Journal*, 25 August 2000: When Bernard Manger died in 1995, he left behind a will that disinherited two of his four children from his \$48 million estate. The reason: They had married people who weren't born Jewish. He counted on his nephew to secure his wishes. His nephew is Sen. Joseph Lieberman, the vice-presidential candidate. "He was like an older brother to me", says Mr Lieberman, Nevertheless, he adds, "I was shocked by the will and in a certain sense embarrassed by it".

The Manger will is an intriguing family tale, but also something more. It thrust Mr Lieberman into a family role that is in many ways a metaphor for the role he now plays on a national stage: as a conciliator trying to bridge the world of Orthodox Jews and the more secular society of millennial America. Ben Manger was a self-made man who parlayed a trade-school education and stint working on airplane wiring in the Army into a small business started in his mother's garage. Over the years his company, Manger Electric Co, became an international supplier of high-tech wiring, and Mr Manger, who lived in Stamford, Conn., amassed a fortune through frugality and hard work. Mr Lieberman lived with his parents in his grandmother's home in

Stamford as a young boy, for years bunking in the same room with his "Uncle Bennie", his senior by 22 years. The two men remained close, and in the early 1990s, Mr Manger informed the senator that he had named him executor of his estate.

During his lifetime Mr Manger gave away large sums, sometimes anonymously.... Mr Manger was a strict but devoted and caring father, relatives say, though at times the relationship with some of his children could be stormy.... As he grew older, Mr Manger became more and more concerned that intermarriage was threatening the existence of the Jewish people. And he worried that his own family was contributing to the diminution because his eldest daughter and son married people who weren't born Jewish. Both spouses converted to Judaism, though not in the Orthodox fashion Mr Manger would have liked.... In 1976 he disinherited his daughter Joyce Maskart, now 50 years old. Three years later, he cut out his son Marc Manger, now 46. When he rewrote his will in 1994, he made his intentions as clear as they could be: "I deliberately and intentionally bequeath and devise nothing [to the two] since they have already departed from the Jewish religion", he stated.... Mr Manger's two other children, twins Stephen and Renee, now 41 years old, were to receive \$50,000 a year for life, adjusted for inflation - so long as neither married outside the faith and each lived "as a Jew"

Two surprises awaited Mr Lieberman, the executor: His uncle had amassed a \$48.2 million estate - far more than anyone had figured - and his two beloved cousins weren't legally entitled to any of it. "I was upset about it and troubled about it, and I felt badly for my cousins", Mr Lieberman recalls. "These were my cousins and I love them" The will requires Mr Lieberman to play a rather intrusive role in the lives of his cousins' families. Mr Manger pledged to pay his grandchildren's college tuition - so long as they attended Sabbath services twice a month and joined a campus-based Jewish organization. He also required his beneficiaries to either have jobs or care for their young children. He authorized Mr Lieberman "to incur all reasonable expense and to hire all services and persons" needed to enforce the will. But the senator says, "We're not going to hire inspectors; we're family"

The senator quickly moved to try to modify the will's harshest provisions, interpreting his own appointment as trustee and executor as a signal from the grave. "He knew who he was making the executor", Mr Lieberman says. "He knew that these were my cousins and that I love them, and that by my nature I'm not as hard as the will was. He knew what I would do". Mr Lieberman was aided in his search for guidance by what he now calls a "miraculous expression of what my uncle wanted". Going through the father's effects shortly after the accident, the disinherited son, Marc, found an unsigned draft of a more recent will in his father's

briefcase. According to Mr Lieberman, that document offered to reinstate the two children, as long as their spouses converted to Judaism according to orthodox rites, and the children now are beneficiaries....

Though humanely motivated and approved by a probate court, the senator's actions raise a question: Did he have the right to overturn the wishes of a dead man who had trusted him to carry out his will? Estate lawyers talk of what they call the "dead hand of the grave theory" - the idea that the deceased shouldn't be able to unduly tie up the lives of those they have left behind. "The more unusual and restrictive a will becomes, the more doctrinaire it is, the greater the chance it will be disputed" in court, says Robert Shapiro, head of trusts and estates at Ropes and Gray the Boston law firm that specializes in managing estates of the wealthy. Mr Lieberman says simply: "I felt what I was doing was right; I was carrying out his intentions".

RESTRAINTS ON ALIENATION: GENERAL

The final case here deals with a particular type of condition contrary to public policy - a restraint on alienation, a condition that limits the ability of the grantee to alienate the land. This is a rather complex area, and we will only look at one part of it. As necessary background, however, something should be said about the typical traditional restraint on alienation case. This would be an interest in land given in a will, attached to which would be a condition that if the land is sold to certain persons, or used for a certain purpose, or not first offered to certain persons, then the estate ends. This is sometimes called a "forfeiture restraint" - the estate is forfeit if the condition is broken. There is a long line of cases to the effect that if such a restraint is substantial (which you can take to mean that it would substantially affect the selling price) then it will be voided. A recent example is an attempt to prevent the grantee from conveying to anyone but the grantee's son: *Thibodeau v. Thibodeau* (1989), 100 N.B.R. (2d) 156 (Q.B.).

It is often said that restraints on alienation are invalid because they are repugnant to the fee simple. That is, the right to freely alienate is a crucial part of the fee simple and you cannot limit it. This is a circular argument, for there is nothing inherent in the fee simple which requires a full power to alienate. The argument is not only circular, it is also wrong, for two reasons. First, so-called "partial" restraints on alienation are permitted. Using the example just given, had the condition been that the grantee could sell to anyone but the son, it would have been considered only partial. But if some notion of repugnancy is really at the root of judicial policy here, a condition eliminating just one possible purchaser is as repugnant as one eliminating all purchasers. As in so many other areas, the difference is one of degree, not principle.

The second reason why the repugnancy argument does not hold water is that very substantial (but not total) restraints survive court scrutiny if they have been bargained for. The leading case is *Stephens v. Gulf Oil Canada Ltd* (1975), 65 D.L.R. (3d) 193 (Ont. C.A.). A three-party agreement for sale of lands contained a clause that if two of the parties wanted to sell they had to offer the properties first to each other, at agreed prices. The agreement stated that if the offeree did not take up this right, the property could be sold to anybody at any price. The requirement to first offer the land to another at a fixed price was challenged as a restraint on alienation. The Court first considered whether this was a condition imposed on the grantee as a necessary prerequisite to get title, or a contractual provision agreed to by the parties. It was held to be the latter, and thus valid. That is, it is possible to agree to a substantial restraint. Here freedom of contract prevails over "repugnancy". Had the pre-emptive right been

a condition imposed, then it would have been void, because the parties would not be able to sell the property at market value.

Laurin deals with circumstances not dissimilar to *Stephens*, yet the court comes to a different conclusion. Try to assess how and why it does so, both as a matter of doctrine and as a matter of policy.

LAURIN v. IRON ORE COMPANY OF CANADA (1977), 82 D.L.R. (3d) 634 (Nfld. S.C.T.D.)

Goodridge, J.: The plaintiff purchased from the defendant certain lands and premises at Labrador City in the Province of Newfoundland, by deed (the "conveyance") dated October 22, 1971, registered in Vol. 1294 of the Registry of Deeds at folios 596 to 603. The deed contains the following clauses:

(2) That in: consideration of the sum of One dollar (\$1) Canadian Currency paid by the Grantor to the Grantee on or before the execution of These Presents (the receipt whereof by the Grantee is hereby acknowledged) and of the mutual covenants and all other considerations hereinafter mentioned the parties hereto respectively covenant and agree as follows:

(i) Should the Grantee cease to be employed by the Grantor or should the Grantor be required to make any payment under the Guarantee or should the Grantee wish to sell the property hereby conveyed, the Grantor is hereby granted the sole and exclusive option, irrevocable within the time limited herein for acceptance, but exercisable at the time of the Grantee ceasing to be employed by the Grantor or of the Grantor making payment under the Guarantee or of the Grantee wishing to sell the property, to repurchase the property hereby conveyed at the price equal to the principal amount repaid, (exclusive of repayments made by the Grantor under the guarantee), on the Mortgage at the time of repurchase, less any amounts paid by the Grantor under or pursuant to the guarantee, less straight line depreciation of 2 % per year on the original selling price of the property from the day and year first above written. On any repurchase by the Grantor on exercise of this option the purchase price payable shall be adjusted by appropriate increase to cover cost of structural improvements to the property and appropriate decrease to reimburse the grantor for the cost of making good damages to the property over and above those resulting from normal wear and tear; provided that improvements for which compensation shall be permitted shall be restricted to those improvements which were approved in writing by the Grantor prior to the commencement of work thereon and shall in no event include landscaping or decoration; and further provided that the Grantor shall be sole judge as to what damage to the property constitutes normal wear and tear and the Grantee shall accept the Grantor's decision in such respect.

(3) That the covenants and agreements hereinbefore contained shall enure to the benefit of and be binding upon each of the parties hereto and their respective heirs, administrators, successors and assigns as fully and as effectually as if the same had been mentioned herein.

CHAPTER FIVE

CONCURRENT OWNERSHIP

(A) INTRODUCTION

We have seen that the common law permits "shared" ownership where ownership is divided by time - for example, the life tenancy and the reversion in fee simple. It also permits two or more persons to own property and to have simultaneous rights in it. When this happens they are said to hold jointly, to be co-owners, or to have concurrent interests in the property. Any estate known to the law, and all types of property, can be the subject of co-ownership.

The term co-ownership here does not refer to that increasingly ubiquitous modern form of urban living, the condominium, or land subject to 'strata title'. In a condominium the individual units are individually owned, the common areas usually owned by a condominium corporation. Rather, we are talking about one interest in property being owned by two or more people. Of course this could be a condominium - a unit in a condo building can be owned in common by multiple owners. It was possible to create condominium arrangements at common law through a series of contracts, but what we now term condominiums are governed by provincial legislation which provides for the establishment, registration, and termination of condominiums, as well as governance mechanisms to deal with common obligations.

Returning to common law co-ownership, and to complicate matters, there is more than one form of co-ownership. Historically there were four, but only two now concern us. Cheshire, *Modern Law of Real Property*, gives us the following explanation:

There are four possible forms of co-ownership, one of which, tenancy by entireties, is now defunct; while another, coparcenary, seldom arises. The two found in practice are joint tenancy and tenancy in common....

The two essential attributes of joint tenancy which must be kept in mind ... are the absolute unity which exists between joint tenants, and the right of survivorship.

There is, to use the language of Blackstone, a thorough and intimate union between joint tenants. Together they form one person. This unity is fourfold, consisting of unity of title, time, interest and possession. All the titles are derived from the same grant and become vested at the same time; all the

interests are identical in size; and there is unity of possession, since each tenant *totum tenet et nihil tenet*. Each holds the whole in the sense that in conjunction with his co-tenants he is entitled to present possession and enjoyment of the whole; yet he holds nothing in the sense that he is not entitled to the exclusive possession of any individual part of the whole. Unity of possession is a feature of all forms of co-ownership.

For this reason one joint tenant cannot, as a general rule, maintain an action of trespass against the other or others, but can do so only if the act complained of amounts either to an actual ouster, or to a destruction of the subject matter of the tenancy.

The other characteristic that distinguishes a joint tenancy is the right of survivorship, or *jus accrescendi*, by which, if one joint tenant dies without having obtained a separate share in his lifetime, his interest is extinguished and accrues to the surviving tenants whose interests are correspondingly enlarged. For example, A and B may be joint tenants in fee simple, but the result of the death of B is that his interest totally disappears and A becomes owner in severalty of the land.

There are cases, however, where the right of survivorship does not benefit both tenants equally, for if there is (say) a grant to A and B during the life of A, and A dies first, there is nothing that can accrue to B.

There is a fundamental distinction between tenancy in common and joint tenancy. In the first place, that intimate union which exists between joint tenants does not necessarily exist in a tenancy in common. In the latter case the one point in which the tenants are united is the right to possession. They all occupy promiscuously, and if there are two tenants in common, A and B, A has an equal right with B to the possession of the whole land. But their union may stop at that point, for they may each hold different interests, as where one has a fee simple, the other a life interest; and they may each hold under different titles, as for instance where one has bought and the other has succeeded to his share. Each has a share in the ordinary meaning of that word. His share is undivided in the sense that its boundary is not yet demarcated, but nevertheless his right to a definite share exists.

The second characteristic, and it is really the complement of the first, is that the *jus accrescendi* has no application to tenancies in common, so that, when one tenant dies, his share passes to his personal representatives, and not to the surviving tenant: "A tenancy in common, though it is an ownership only of an undivided share, is, for all practical purposes, a sole and several tenancy or ownership; and each tenant in common stands, towards his own undivided share, in the same relation that, if he were sole owner of the whole, he would bear towards the whole."

(B) JOINT TENANCY OR TENANCY IN COMMON?

Given the consequences of the distinction between joint tenancy and tenancy in common - principally, the right of survivorship - it is obviously important that we know in each case which of the two co-ownership regimes is in force. Sometimes this is easy. For example, if a will states that land is given "to A and B as joint tenants in fee simple" then A and B hold as joint tenants. The four unities are present and the testator or testatrix has clearly indicated a desire to establish a joint tenancy. But it is not always so simple. Remove the words "as joint tenants" from the above provision and, while the four unities are still present and while the testator or testatrix clearly wishes A and B to be co-owners, we cannot say from the words alone whether that co-ownership is as joint tenants or as tenants in common. What we need here are presumptions to deal with unclear cases. Unfortunately, courts of common law and courts of equity operated with different presumptions, and statutory reform has partially amended the common law rules.

At this stage we therefore need to embark on a small diversion into equity. The following extract from the first edition of Ziff, *Principles of Property Law*, provides a brief introduction to the meaning of "equity" and how it relates to the common law. Although the most important aspect of equity - the trust - is the subject of a separate course, it is necessary to have some understanding of equity both for this chapter and for the one below on covenants running with land. The first section on "The Origins of Equity" details the historical development of equity, both in the area of doctrine and as a separate set of institutions. The second section on the use and the trust is the more important for our purposes, for it describes, albeit briefly, how the notion of a separate equitable title came into the law. This section misses out the story of how the "use" developed into the modern "trust", but that is not important for current purposes. While there were significant differences between uses and trusts, concentrate on understanding the concept common to both - the holding of property by one person at common law for the benefit of another in equity.

The Origins of Equity "Equity" is a ductile term, capable of a variety of connotations. In a broad sense, to do equity is to act fairly or justly. In a more narrow way, one speaks of home owners or investors gaining or holding equity in some property or business enterprise. These meanings relate to the use of the term to represent a cognate set of rules, separate from the common law, which give rise to rights enforceable in a court of equity. This body of jurisprudence emerged from the Crown's residual prerogative over the administration of justice, a power capable of being used as a corrective measure for defects or omissions in the common law. The story of this development is long and intriguing; it is told only briefly here.

The need for remedial institutions for the courts of common law was manifested by complaints of injustice, levelled by unsuccessful litigants, and directed to the Crown as the fount of all justice. At this formative stage, in the thirteenth century, a variety of approaches were used to respond to the grievances, including: directions to the common law courts to do justice in a given case; references to Parliament (where a general change in the law might be appropriate); and delegation to either the royal council, or to individual councillors, including the Chancellor. The office of the Chancellor served as the royal secretariat, responsible for such matters as the sealing of official documents with the Great Seal of England, and the issuance of writs. The writs allowed for the commencement of legal proceedings in the common law courts (the Court of King's Bench, Exchequer and Common Pleas). By the end of the thirteenth century, the capacity of the Chancellor to devise new writs, when new causes of action were recognized, was severely restricted, and this led to the practice of presenting special petitions, as mentioned above. The Chancery emerged as the principal authority charged with the responsibility of assessing the merits of these special pleas.

The early Chancery did not resemble a court. The structure of its operation was divided into two chambers. On the Latin side (so-called because the records were in that language), it served mainly as an administrative agency, although it could hold inquiries into, and make determinations on, such matters as title on the death of a tenant of land. It could also entertain complaints against the Crown. On the English side, bills of complaint delegated from the Crown were heard, or delegated further, sometimes to the common law courts. It was in the latter part of the fourteenth century that the Chancellor increasingly undertook to hear petitions and issue decrees, and by the fifteenth century the Chancery was being regarded as a court of conscience, designed to cure the harshness that could result from unyielding common law doctrine, with its penchant for rigid certainty and technicality. Eventually, the brand of justice dispensed by the Chancery was referred to as equity.

The description of the Chancery as a court of conscience was meant to contrast it with the courts responsible for administering the common law. Until the beginning of the sixteenth century, equity was not a body of fixed substantive rules and precedents. Even as principles began to emerge under the rubric of equity, their application remained a matter of discretion, so much so that in the middle of the seventeenth century John Seldon remarked that the standard of justice varied with each successive Chancellor:

"Equity is a roguish thing: for law we have a measure, know what to trust to: equity is according to conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one, as if they should make the standard for the foot, a chancellor's foot; what an uncertain measure would this be? One chancellor has a long foot, the other a short foot, a third an indifferent foot: 'tis the same thing in the chancellor's conscience".

These famous words must have echoed in the ears of future Chancellors, for in 1818 Lord Eldon confided that "[n]othing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this Court varies like the Chancellor's foot." In fact, in the period between these two statements, the nature of equity was changing, solidifying. The practice of appointing ecclesiastics as Chancellors (most of whom had training in canon law) gave

way to the selection of lawyers, the last non-legally trained Chancellors in England being the Bishop of Lincoln (who served from 1621-25) and Lord Shaftsbury (1672-73). In truth, even before Seldon's admonition, Chancellors had begun relying on past decisions. In 1727, a treatise on equitable maxims was published, serving to further the process of encoding basic principles....

Equity has always been conceived as a means of perfecting the common law, to improve and supplement, but not supplant it, and the workings of these two discrete regimes were, in theory, harmonious. The thinking was that "equity... does not destroy the law, nor create it. but assist it." However, it was inevitable that some form of political and jurisdictional friction would ensue. Where an order emanating from a common law court was regarded as unjust, it could be stayed by the issuance a common injunction issued by the Chancery. When, in the early seventeenth century, the effect of the common injunction was challenged, unsuccessfully, it was resolved that where a conflict between the common law and equity arose, it was equity that would prevail: that remains so. Therefore, while the starting position was - and remains - that equity purports to follow the law, it was also true that it would not do so slavishly. Otherwise, its curative function would be rather limited and ineffective.

From the seventeenth to the nineteenth century, the overall complexion of equity changed vastly. It lost its original elasticity, giving way to a more predictable system of governing rules. Equity was still pliable, but so was the common law, which has always developed through analogical extension in the face of new circumstances and disputes of first impression. Despite these growing similarities, these two separate juristic systems stood side by side, a matter that could create difficulties, since rights and remedies available through one court might not be tenable in another. The common law courts applied only common law doctrine (as altered or augmented by statute), and possessed the power to grant a limited set of remedies, the principal one being damages. Equity developed additional remedies, including the injunction and the order of specific performance. Furthermore, differences in the procedures followed in the two court systems created two solitudes among the practising bar: those who appeared in the common law courts and those involved in Chancery litigation. From its genesis as a system of inordinate informality Chancery practice had by this time become so convoluted that attendance there was no simple matter for the uninitiated.

Some reform of the procedures used in the Court of Chancery was undertaken in the 1850s, but it was not until the 1870s that the administration of justice underwent large-scale restructuring in England. The primary development was the fusion of courts of law and equity, so that the two cognate bodies of rules could be adjudicated upon by a single court. Importantly, the conventional view is that these administrative reforms did not directly alter substantive rules. Equitable interests in land remained distinct from those recognized by courts of law, so that the holder of equitable title may still be regarded as a trespasser in the eyes of the common law. This will be illustrated below.

The adoption of equity into the common law provinces of Canada was straightforward, by and large. However, the process was not a smooth one in some provinces. For example, Upper Canada had no court of equity until 1837, and so, until then, equitable remedies, including those used to enforce trusts, were unavailable. The abuses known to plague the English Chancery produced some apprehension about the introduction of a court of equity to such an extent that an attempt to introduce a court in the

1820s was thwarted. The absence of a court of equity in Nova Scotia was remedied from 1749 to 1825 by the Lieutenant-Governor, as keeper of the Great Seal, sitting as the Chancellor, acting (probably from the 1790s on) with the assistance of members of the Supreme Court of the province. As in England, the Court of Chancery became a publicly vilified and thoroughly unpopular institution, and it was abolished in 1855, with the jurisdiction being transferred to the Supreme Court. This move was influenced by a more modest initiative in New Brunswick of a year earlier, which itself had been inspired by American developments. The Nova Scotia legislation conferred equitable jurisdiction on the Supreme Court - this produced a fusion. However, by 1864 the position of "judge in equity" was created in the Nova Scotia Supreme Court, thereby reducing the extent to which the two systems had been merged.

In Alberta, the general reception rule was supplemented by an express incorporation of the powers of the English High Court of Chancery, as of July 15, 1870. It was provided also that, generally speaking, "the rules of decision" are to be "the same as governed the Court of Chancery of England in like cases on July 15, 1870". Despite the apparent tenor of this provision, established principles of equity have not been frozen in time like the Franklin expedition; they have been allowed to live and develop.

The Emergence of the "Use" and the "Trust" From a contemporary standpoint the enforcement of the "use", from which later emerged the "trust", stands as the chief contribution of equity to the law of property. To appreciate its nature and significance, the discussion returns to developments in England in the Middle Ages.... The use was a device under which the legal title was granted to one person to hold for the benefit of another. Accordingly, under a grant to uses, land was transferred by A (the feoffor to uses), to B (the feoffee), to be held for the benefit of C (the cestui que use). The purpose of such a transfer was to place legal title in B, who was intended to hold it for uses designed to serve C. As will be seen below, such an arrangement was created in circumstances in which it was expedient to separate legal title from the person who was intended to have the real benefit of land, usually because of some disadvantage or disability associated with the holding of the legal title.

The practice of transferring land to uses pre-dated the Chancery's involvement in the process, and it is suggested that some uses were initially enforced by the Church. There is also some evidence that at one time the common law recognized uses, but that position did not prevail. As far as the law was concerned, the cestui que use had "no more to do with the land than the greatest stranger in the world". Put even more bluntly, the person whom the use was designed to benefit had no rights in a common law court - no entitlement at law to any interest in the land whatsoever. In a grant "to B to the use of C", legal title was reposed in B.

The Chancellor, by contrast, eventually recognized C's right, and the enforcement of uses became a central function of the Chancery, its orders fixing on the conscience of the feoffee (B) to carry out the purposes for which the use had been created. C, having a right that a court of equity would enforce, came to be thought of as holding an equitable proprietary interest. The Chancellor would not deny that B held legal title. This entitlement was duly acknowledged, and the rights in equity were in fact premised on the existence of the common law title. However, equity regarded the legal interest as managerial only, for it was coated with the obligations imposed in favour of C, and these were treated as paramount.

Modern Functions of the Trust The old functions of the use have been eclipsed over time, but the modern trust possesses its own vitality as a mechanism of private law estate planning and commercial practice. A trust can be set up to allow property to be held for the benefit of minor children, or other dependants. In general, protective trusts can be established, designed to allow a person to enjoy the benefit of trust income, while preventing the beneficiary from having control over the property.... [W]here rights over real property are divided between present and future owners the interposition of the trust can provide one means of regulating the management of the property. Similarly, trusts can be used in a testamentary context to allow for the management of a decedent's estate. A trust is one means through which property can be devoted to charities, for there are the principles of equity (and those added by statute) that create special (generally advantageous) rules for charitable trusts. Within the commercial realm, pension plans, mutual fund investments, debt security, indeed many types of financial ventures, can be undertaken using a trust instrument in some way. The "trading trust" can serve as an alternative form of business organization to the partnership or corporation. And the administration of trusts is itself a field of commercial endeavour. Trusts are sometimes created under statute as a means of effecting public policy. The trust can be deployed as a means of tax planning, that is, it can be used to assist in the ordering of one's (personal or business) affairs in a way that minimizes tax liability. Indeed, it has been offered that "the trust is the estate planning vehicle par excellence"....

This overview intimates that trusts are principally advantageous to wealthy organizations or individuals, and that for others they are of marginal or incidental importance. In the main this may be accurate. At the same time it must be understood that trusts may be created in wholly mundane circumstances, involving modest items. Even something as ostensibly worthless as season tickets to see the Calgary Flames play hockey can be the subject of a trust. Moreover, charitable trusts facilitate the redistribution of wealth through eleemosynary donations, and as such, these are concerned with more than just elite practices.

Common Law, Equitable, and Statutory Rules on Presumptions

With an understanding of equity, we can return to the issue of presumptions. The rules here may be stated as follows:

1) At common law, provided the four unities were present, grants and testamentary dispositions of all property, real and personal, made to co-owners, were presumed to be joint tenancies if the words of the transfer were equivocal. Thus a simple phrase like "to A and B" created a joint tenancy. The common law took this position because survivorship lessened the number of names on the title and thereby made conveyancing easier.

2) Equity preferred the opposite presumption to the common law. That is, it preferred tenancies in common to joint tenancies because they were fairer and did not contemplate an owner, or rather an owner's heirs, losing all rights through survivorship. However, the general principle that "equity follows the law" meant that equity could not presume a tenancy in common in all circumstances, for that would have meant that equity would have "overwhelmed" the law. It therefore accepted the common law presumption where the joint tenancy was clearly stated.

However, it would try to find "words of severance" in a grant or will when it could. As it is put in Cheshire, *Modern Law of Real Property*, equity found a tenancy in common if there were "words of severance showing an intention, even in the slightest degree, that the donees are to take separate shares....

In addition, in some circumstances equity refused to follow the law and presumed a tenancy in common in equity even if the four unities were present and the intention to create a joint tenancy was clear. There were three circumstances where, per Cheshire again, "equity reads what is at law a joint tenancy as a tenancy in common". They were: (a) where money is advanced on a mortgage, whether in equal or unequal shares; (b) where the purchase price is provided in unequal shares; and (c) where the property belongs to a business partnership.

3) The rules enunciated above remain the common law and equitable approaches to personal property. However, statutory reform has altered the rules for real property. It is now presumed that a tenancy in common has been created unless the instrument clearly states otherwise. Section 13 of the *Conveyancing and Law of Property Act*, R.S.O.

1990, c. C-34, states:

13 (1) Where by any letters patent, assurance or will, made and executed after the 1st day of July, 1834, land has been or is granted, conveyed or devised to two or more persons, other than executors or trustees, in fee simple or for any less estate, it shall be considered that such persons took or take as tenants in common and not as joint tenants, unless an intention sufficiently appears on the face of the letters patent, assurance or will, that they are to take as joint tenants.

(2) This section applies notwithstanding that one of such persons is the spouse of another of them.

Thus to create a joint tenancy in land you now need to say "to A and B as joint tenants and not as tenants in common". Obviously if this is done, if an "intention to the contrary" is clearly indicated, the joint tenancy must stand; equity cannot overrule the statute.

Putting all these rules together, we can conclude that if A and B acquire real property, they do so as tenants in common, unless there are clear words to the contrary. Such a clear contrary intention would prevail over the equitable rules, because equity, like common law, must give way to a statutory rule.

If A and B acquire personal property, the common law presumes that the legal title is held as a joint tenancy, unless it is clearly stated otherwise. But if, for example, the property is then used by A and B in a business partnership, equity presumes that the equitable title is held as a tenancy in common. In this situation the personal property would be held by two or more persons as legal (a term used to mean common law as opposed to equitable) joint tenants and as trustees for each other as equitable tenants in common. We will see the operation of the equitable preference for tenancies in common again, in the section below on severance of joint tenancies.

Note two other statutory provisions. Section 14 of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C-34, provides:

14. Where two or more persons acquire land by length of possession, they shall be considered to hold as tenants in common and not as joint tenants.

Section 55 of the *Succession Law Reform Act*, R.S.O. 1990, c. S-26, provides:

55 (1) Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the property of each person, or any property of which he or she is competent to dispose, shall be disposed of as if he or she had survived the other or others.

(2) Unless a contrary intention appears, where two or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person shall be deemed, for the purposes of subsection (1), to have held as tenant in common with the other or with each of the others in that property.